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THE CREATION OF CASE LAW
UNDER THE
NATIONAL INSURANCE AND NATIONAL INSURANCE (INDUSTRIAL INJURIES) ACTS *

I AM afraid on reflection that to entitle the few observations that I shall make this evening a paper on "the creation of case law under the National Insurance and National Insurance (Industrial Injuries) Acts" may be thought to be a little presumptuous, since it must be remembered that case law under those Acts is only in its infancy. The Acts, with a minor exception, came into effect on July 5, 1948, and five years is a very short time for building up a system of case law, the very essence of which is the gradual evolution of principles from the decision of individual cases.

Administrators prefer to lay down principles in advance and thereafter to decide cases according to them, but lawyers declare that experience shows that the ordinary affairs of life are of such infinite variety that any system of rules built up in advance will be found to produce in their application to particular cases an unnecessary number of hard cases. They are not so foolish as to suggest that hard cases can be eliminated, but they claim that, if the rules to be applied are left flexible, while experience of the actual cases calling for decision is gained, it will be possible after a time to discern an underlying pattern in the reasons that have led the deciding tribunal to decide a particular case as it did. It is, however, a prerequisite to the success of such a design that the deciding tribunals should all the time be seeking to recognise the basis of the reasoning which they themselves, or other like tribunals, have used in the past.

It was thus that the use of precedent grew up. At first it led with the common law after the lapse of many years to undue technicality and formalism and equity stepped in as a reminder that pure logic pressed too far might be unsuccessful as an instrument of justice and the ultimate fusion of law and equity gradually

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built in the hands of the courts of this country a system so acceptable to the vast majority of the community for the dispensation of justice that the conception that the administration of justice, even in particular classes of cases, could properly be entrusted to anyone other than the judges was regarded with distaste.

Administrative tribunals were, therefore, suspect and it was up to them to justify themselves in public estimation. This they have done with, I regret to say, varying degrees of success. Some, no doubt, have been handicapped by the fact that government policy had necessarily to participate in their decisions. The tribunals under the National Insurance and National Insurance (Industrial Injuries) Acts have had the advantage that they did not suffer from *that* handicap. Their function was to determine questions relating to rights to benefit, according to the provisions of the relevant Acts and statutory instruments made under them, and into that function government policy did not enter. It had already entered, no doubt, into the Acts and regulations, but that had happened before the function of the statutory tribunals fell to be performed.

Thus, the statutory tribunals under those Acts were called on to perform a judicial function, unhampered by government policy. The Ministry of National Insurance administers the Acts, but the statutory tribunals stand outside as independent persons, who have to decide the rights of members of the public under those Acts, and the subject can complain to them if he thinks that he has not enjoyed those rights.

Certain medical questions under the Industrial Injuries Acts fall for decision by medical boards and medical appeal tribunals on appeal.[1] Certain other matters under both Acts relating to insurability, the payment of contributions and kindred questions fall for decision by the Minister, though in practice he refers the question to a person appointed by him.[2]

Questions as to the right to benefit fall for decision by what I have called the statutory tribunals.[3] I have used this term with this limited meaning for the purpose of convenience in the present paper, though the medical tribunals are, no doubt, equally entitled to the name. The primary decision is made by a local insurance

[1] See, for example, the N. I. (I. I.) Act, 1946, s. 36 (1) (*c*) and the N. I. (I. I.) (Prescribed Diseases) Regs., 1948 (S.I. 1948 No. 1371) Second Schedule, para. (1), as amended by the N. I. (I. I.) (Prescribed Diseases) Amendment (No. 2) Regs., 1949 (S.I. 1949 No. 1697).

[2] See, for example, the N. I. Act, 1946, s. 43 (1) and the N. I. (Determination of Claims and Questions) Regs., 1948 (S.I. 1948, No. 1144), reg. 2 (1) and the N. I. (I. I.) Act, 1946, s. 36 (1) (*a*).

[3] See the N. I. Act, 1946, s. 43 (3) and the N. I. (Determination of Claims and Questions) Regs., 1948, referred to above, Part IV, as amended by the Amendment Regs. of 1951 and 1952 (S.I. 1951, No. 1208 and S.I. 1952, No. 1310) and the N. I. (I. I.) Act, 1946, s. 36 (2) and ss. 42–50 and the N. I. (I. I.) (Determination of Claims and Questions) Regs., 1948 (S.I. 1948, No. 1299), Parts III and IV.

officer; there is a right of appeal to a local tribunal. The tribunal is called a " local tribunal " under the Insurance Acts and a " local appeal tribunal " under the Industrial Injuries Acts. They may be the same persons, but the relevant regulations as to procedure are slightly different and it is wise, therefore, to bear in mind that the difference exists. A local tribunal is not open to the public. A local appeal tribunal is. Before a local tribunal a claimant cannot be legally represented. Before a local appeal tribunal he can be with the leave of the chairman. The fact that a claimant cannot be legally represented before a local tribunal has been criticised in some quarters, but the vast number of cases to be dealt with has led to the view that a more summary procedure is unavoidable, lest the whole machine be clogged and the determination of appeals relating to benefit unduly delayed. In order to get the matter in perspective it is wise to remember that there are an average of approximately 60,000 appeals to local tribunals under the National Insurance Acts decided in a year, apart from some 7,000 appeals under the Industrial Injuries Acts.[4]

From the local tribunals and the local appeal tribunals there is an appeal to the Commissioner. Leave to appeal is required in many cases, including all cases under the Industrial Injuries Acts. There is a Commissioner and there are several Deputy Commissioners. The Deputy Commissioners are treated as manifestations of the Commissioner. Their decisions are equally final. They are all required to be barristers or (in Scotland) advocates of at least ten years' standing.[5] They normally act alone. If it appears to the Commissioner, however, that a case raises a question of law of special difficulty, he may direct that three Commissioners shall act together to determine it. The decision of the majority is the decision of such a tribunal.

Not every case involves an oral hearing. Some are dealt with on the papers. A claimant or the insurance officer (who seeks to justify the decision of the local insurance officer) may ask for a hearing and the Commissioner must grant the application, unless he decides, after considering the record of the case and the reasons put forward in the request for the hearing, that the appeal can properly be determined without a hearing. In practice, naturally, a hearing asked for is granted unless an appeal must manifestly fail and the admitted facts show it would be fruitless to have a hearing, or the points urged by the appellant are irrelevant, or the Commissioner, in view of the facts disclosed in the papers, intends

[4] The figures quoted in Reports of the Ministry of N. I. covering the years 1950, 1951 and 1952 (Cmd. 8412, 8635 and 8882) show the following figures:—

	Appeals and references under the N. I. Acts	Appeals and references under the N. I. (I. I.) Acts
1950.	68,166	7,249
1951.	55,103	7,491
1952.	56,893	7,165

[5] See the N. I. Act, 1946, s. 43 (3) (*c*) and the N. I. (I. I.) Act, 1946, s. 42 (1).

to decide in favour of the person asking for the hearing, or some other reason that would, the Commissioner believes, satisfy a reasonable person that to hold a hearing would be putting the person asking for it to trouble in vain.

In appeals to the Commissioner claimants are entitled to be legally represented and frequently are. In giving decisions the Commissioners always give their reasons and their decisions are always given in writing.

I have given you this short reminder of the circumstances in which the need for a body of case law arose in connection with the decision of claims under the National Insurance Acts so that the background of the matter may be in your minds. Speaking as I am primarily, no doubt, to a body of lawyers, I do not think that I need to justify the use of precedents. With local insurance officers and local tribunals all over the country called upon to decide claims for benefit a uniform result in comparable cases is a manifest desideratum. No body of men, whether judges or other men, are likely to arrive at correct decisions in every case, indeed it may always remain a matter of controversy what was a correct decision in some cases, but at least uniformity of result in like cases can be aimed at and that is the justification for an appellate system which leaves the final decision in the last resort to as small a body of men as practicable, since a man is less liable to decide a similar case differently on two different occasions than two different men are. If, then, by tacit agreement what has been previously decided by the final court of appeal is accepted as a guide for the future that is part of the way towards the attainment of equal handed justice.

Accordingly, selected decisions of the Commissioner or Deputy Commissioners, without distinguishing them, are reported for general guidance. They are purchasable at the Stationery Office and supplied to local tribunals, local appeal tribunals and local insurance officers. The decisions selected for report are those which, in the view of the Commissioner, will be of help in the decision of future cases. It is hoped in this way to avoid too vast and unwieldy a bulk of reported cases and yet at the same time to keep before any persons interested the knowledge of the basis on which the statutory tribunals are acting and may be expected to act in the future.

With these few preliminary remarks I now turn to some observations on the material that was already in existence to aid the Commissioners themselves in the formulation of their reasons. You will well understand that the Commissioners needed all the help they could get from the past, for to give a reasoned decision in writing in every case and yet to remain consistent is no easy task, particularly when the matter involves consistency not only with your own past decisions, but those of your brethren. To attain that object the Commissioner and Deputy Commissioners read

copies of all the decisions of their brethren, except a few which turn solely on questions of fact or are simple applications of long established principles.

The material available from the past, apart from the general law, which inevitably has to be kept in mind, consisted, so far as unemployment benefit was concerned, of " Selected decisions of the Umpire " under the former Unemployment Insurance Acts. Under those Acts the appeal from an insurance officer had been, first, to a local Court of Referees (the counterpart of the present local tribunals) and from the Court of Referees to the Umpire or one of the Deputy Umpires (the counterparts of the Commissioner and the Deputy Commissioners). In many cases the provisions of the National Insurance Acts and the regulations made under them used the same words as those already interpreted by the Umpire under the Unemployment Insurance Acts and the regulations made under them and it was, accordingly, prima facie reasonable to suppose that the legislating body by adopting the same words intended to effect what their former words had been held to mean by the competent authority. Accordingly, the Commissioners accepted the view that prima facie they would follow decisions of the Umpire, without binding themselves to do so in case it appeared that other considerations had now to be taken into account or for what appeared to them other good reason. My present point is that on many questions relating to unemployment insurance these decisions afforded a valuable source of information and a useful body of careful reasoning.

So far as sickness benefit was concerned there were also a certain number of reported decisions of Referees under the former Health Insurance Acts. They were relatively few in number and for present purposes of relatively less importance.

So far as widows' pensions were concerned there was a selection of decisions of the Referees under the Contributory Pensions Acts circulated amongst the Referees. These were also recorded in a Digest. They were not reported, a matter which personally I have always regretted, for I firmly believe that it is only fair to a tribunal whose decision is final that the public should have an opportunity of judging for themselves how the tribunal is performing its duties. I was in possession of the Digest and a number of these decisions as I happened to be a Referee before 1948. In order that the decisions of the Referees should be co-ordinated it had been agreed among them that cases which appeared to involve a new point of law should be referred to one or two of their number, called for convenience Senior Referees, and that the decisions in such cases should be accepted as precedents for guidance in future cases. I had been such a Referee. I was, therefore, conversant with these matters and, in so far as those decisions were relevant, was naturally able to place such material as I had at the disposal of my brother Commissioners.

So far as retirement pensions were concerned, the decisions of the Referees under the Contributory Pensions Acts relating to old age pensions had little relevance on account of the change of basis on which retirement pensions were awarded. But, after the National Insurance Act had been passed in 1946 and before its main provisions came into operation in July, 1948, regulations had provided for an increase in the rate of an old age pension under the Contributory Pensions Acts, if the recipient of the pension had retired from regular employment on or after September 30, 1946. The decision of the question whether a claimant had so retired had been left by those regulations to the Courts of Referees under the Unemployment Insurance Acts and on appeal from them to the Umpire or Deputy Umpires. Selected decisions of the Umpire on those questions had been published and have been most helpful.

Finally, turning now to the Industrial Injuries Acts, which have replaced the Workmen's Compensation Acts, there was, of course, the well-known body of decisions of the courts under those Acts. Though the Commissioners were not technically speaking bound by those decisions, the use of similar words on a number of occasions in the Industrial Injuries Acts led to the natural conclusion that prima facie it was intended by the legislature to effect the purpose which the courts had declared them to have effected by the use of the same words in the past. There was, however, this basic difference between the Commissioners and the Court of Appeal or the House of Lords, that that court and that House were bound by the decisions of fact of the county court judge, whereas the appeal to the Commissioner is a rehearing which compels the Commissioners to decide the facts as well as the law. Some of the difficulty in reconciling the decisions of the courts has been due to the limitation of their function named above. The facts and inferences of fact found by the county court judge had to be accepted, unless it was possible to say that as a matter of law he could not properly find the facts or draw the inferences which he did. Accordingly, even though the meaning of words in the Workmen's Compensation Acts similar to words in the Industrial Injuries Acts had been very extensively canvassed by the courts and applied to all manner of situations, there remained many points at which the dividing line between success and failure of a claim was difficult to draw. The Commissioners have, accordingly, been engaged in trying to formulate for themselves what they conceive to be the true dividing line, making full use of the help that they can receive from a study of these cases.

I now turn to some illustrations of the manner in which case law has been built up. One of the earliest questions that arose for decision was what constituted good cause for delay in making a claim for benefit. By the National Insurance Act, 1946, s. 28 (2) it is enacted that regulations may provide for disqualifying a person for the receipt of any benefit if he fails to make his claim

therefor within the prescribed time and comparable provisions are to be found in the National Insurance (Industrial Injuries) Act, 1946, s. 25 (1).

The regulations in question enable the prescribed time to be extended if good cause for delay in making the claim is proved. The expression used in the regulations under the Industrial Injuries Acts is " reasonable cause," but the Commissioner has decided that the two expressions have similar meanings. One of the first pleas made by claimants was that they were unaware of the time limits for claiming benefit. It was held, following decisions of the Umpire to whose decisions I have already made reference, that this was not good cause for delay.[6] It was said " a claimant fails to show ' good cause ' by alleging that he was ignorant of the requirements of the statutes or regulations or of his rights and duties thereunder, because it is the duty of the claimant in this and in any other case, if he is in ignorance or doubt, to make inquiry of those persons who are competent to give official information and instruction."

Some local tribunals have spoken of the matter as if the basis of the decision was that a person is deemed to know the law or that ignorance of the law is no excuse. That, however, is not the basis of the decision. The principle that ignorance of the law is no excuse has been said to apply only in criminal cases. As it has been recently put by the Commissioner, ignorance of the requirements of the statutes and regulations is not good cause for delay because " persons who do not know their rights under the National Insurance Act, 1946, or what they have to do to obtain them, are expected to make reasonable inquiries to ascertain the true position. If they do not, it is impossible that they should know." [7] It was early pointed out, however, that the reason for the failure to inquire must be taken into account. Thus, where a man was so seriously ill that he could not reasonably be expected to make such inquiries, that is good cause and, again, where a claimant believed on reasonable grounds, having regard to the instructions which he had received from his employers, a government department, that they were submitting a claim on his behalf, that was held to be good cause for delay.[8]

Many other instances might be quoted, but a principle was emerging and the Commissioner expressed it thus: " good cause " means " some fact which, having regard to all the circumstances (including the claimant's state of health and the information which he had received and that which he might have obtained) would probably have caused a reasonable person of his age and experience to act (or fail to act) as the claimant did." [9]

[6] Decision C.W.S. 3/48.
[7] Decision R.(G.) 3/53.
[8] Decision C.S. 80/49. See also Decision C.S. 100/49.
[9] Decision C.S. 371/49.

Two basic questions came up for decision after these appeals had been running for some time. Objection was taken by a claimant to the receipt by a local tribunal of hearsay evidence. The tribunals under the Insurance Acts, although they perform a judicial function, are not courts of law and are not, therefore, bound by the rules of evidence. If an attempt had been made to insist on compliance with them much injustice would be done. There is no power to subpoena witnesses and, accordingly, if written communications could not be received for the purpose of proving facts stated in them many cases would have to be decided without essential information being before the tribunal. So, too, a witness who is willing to attend may be the only means of ascertaining any information at all on a subject as to which he has made inquiries but has no personal knowledge. On the other hand, it was pointed out in the decision which decided the admissibility of hearsay evidence [10] that the value of evidence which would be inadmissible in a court of law must be carefully considered and such evidence may be of very little weight. The question at issue was whether an injury had occurred by reason of the claimant and another lad skylarking, and the evidence of a representative of the employers that the other lad had admitted they were skylarking had to be put against the fact that the other lad had attended as a witness and had persisted in denying that he had made any such admission. Various possible explanations were open. It might be that the other lad had blurted out the truth. On the other hand, it might be that to exculpate himself from his carelessness in throwing on to the claimant's head a piece of scrap metal, which it was his duty to throw up to a pan, he had sought at first to blame the claimant for throwing scrap metal at him. It was thus shown that, apart from possible misunderstandings or inaccuracy of recollection on the part of the employers' representative, the accuracy of that witness's evidence was not necessarily inconsistent with the claimant's story being truthful and that it was primarily on the credibility of the claimant's evidence that the success or failure of his claim must depend. This case happened to be a case under the National Insurance (Industrial Injuries) Act, but the same principle was applied under the Insurance Act in Decision R(G)1/51.

The other basic question which arose [11] was "what constitutes proof of a fact." There we had the assistance of the highest authority, and the Commissioner quoted the observations of Lord Birkenhead (then Lord Chancellor) in *Lancaster* v. *Blackwell Colliery Co.*[12] He said "if the facts which are proved give rise to conflicting inferences of equal degrees of probability, so that the choice between them is a mere matter of conjecture, then of course the applicant fails to prove his case, ... But where the known

[10] Decision C.I. 97/49.
[11] Decision C.I. 401/50.
[12] 12 B.W.C.C. 400 at p. 406.

facts are not equally consistent, where there is ground for comparing and balancing probabilities as to their respective value, and where a reasonable man might hold that the more probable conclusion is that for which the applicant contends, then the arbitrator is justified in drawing an inference in his favour."

By the National Insurance (Industrial Injuries) Act, 1946, s. 7 (4) an accident arising in the course of an insured person's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment. It is to be noted that the words used are " in the absence of evidence to the contrary " not " unless the contrary is proved " and, accordingly, it was held [13] that the presumption arose only when there was nothing in the known circumstances from which it could reasonably be inferred that the accident did not arise out of the employment. If the relevant facts were known, the question fell for decision according to the ordinary principles on which a fact can be held to be proved as above. In the case dealt with in the decision in which this was explained, although the presumption did not help the claimant, the injury was held to have been caused by accident arising out of and in the course of the claimant's employment. She was a canteen assistant and while in the kitchen of the canteen turning off a tap, after filling a tea jug, she was bitten by a cat. The cat was in the habit of coming into the kitchen and was fed by the workers. The case was held to fall within the principle laid down by Russell L.J. in *Lawrence* v. *George Matthews (1924), Ltd.*[14] " if the accident has occurred to a workman by reason of the employment bringing about his presence at the particular spot and so exposing him to a danger which in fact is proved to exist at that particular spot, then the accident arises out of the employment." " The danger," it was said, " of being bitten by a cat is proved to have existed in the kitchen where the claimant was by reason of her employment having brought her there, and, accordingly, it is correct to say that the accident arose out of her employment."

In a later case [15] it was emphasised that the presumption arose only if the accident has been shown to have arisen in the course of the employment. Thus, in a case where there was no evidence that when the claimant's accident occurred he was doing anything which he was employed to do or anything incidental thereto, and since there was some evidence that he had made a jocular remark to a fellow employee from the top of the wall where he received his injury, it was held that he had failed to prove that the accident arose in the course of his employment and the presumption did not arise.

On the other hand, there is a presumption against suicide (compare, for example, the reference by Farwell L.J. to this in *Bender* v. *Owners of S.S. Zent* [1909] 2 K.B. 41 at p. 45) and it follows that

[13] Decision C.I. 3/49.
[14] 21 B.W.C.C. 345 at p. 365.
[15] Decision C.I. 47/49.

a sailor drowned at sea whose dependants might have failed to prove under the former Workmen's Compensation Acts that the accident arose out of his employment, because there was no evidence as to the circumstances of his going overboard, might well succeed with the aid of the presumption under section 7 (4) because the members of a ship's company while at sea are prima facie continuously in the course of their employment.[16]

Now to turn to a different topic. Although it had been decided in *Dickinson* v. "*Barmak*," *Ltd.* (1908) 124 L.T.News. 403 that the employment of commercial travellers extended from the time they leave home to commence their duties until they get back again, this view was shown to be mistaken in the case of *Dunning* v. *Binding* 25 B.W.C.C. 361 and 655 and the Court of Appeal decided in that case that commercial travellers were not in a special class, but that the test to be applied to them, as to other persons, was that laid down in *St. Helens Colliery Co., Ltd.* v. *Hewitson* [1924] A.C. 59, namely: did the accident happen when the workman was doing something in discharge of a duty to his employer, directly or indirectly imposed upon him by his contract of employment?

In the case of a commercial traveller it may be relatively easy to make up one's mind whether he is at a particular time in the course of his employment, but there are many occupations where the question whether a person is travelling to work or on work is very difficult to decide. It is well recognised that a clerk going to his office from his home or a workman going to his factory is not in the course of his employment. He is travelling to work. So, in *Lye* v. *British and Argentine Meat Company* (*1923*), *Ltd.* (20 B.W.C.C. 341), the court held that an errand boy, sent by his employer to carry goods to a customer and told that he might go home to tea after delivering them, but after tea must call on another customer to take an order before returning to his employer's shop, was not in the course of his employment while returning from his home to the customer on whom he had to call. His work did not recommence until he reached that customer's house.

But what about a roadman employed by a county council who had to provide himself with a bicycle and fell off while riding home from the place where he had been working? It was held in a commissioner's decision that he was not in the course of his employment when the accident happened. He was using his bicycle for his own purposes and not for his employer's purposes.[17]

Then there was the case of a tubular scaffolder who often had to work at a number of different sites in the course of the same day. He agreed with his employers that he should buy a motor-cycle and ride it from site to site, his employers paying him 3s. a day for travelling time and petrol. The scaffolder had been killed when

[16] Decision C.S.I. 23/50.
[17] Decision C.I. 33/50.

riding from his home to the first site at which he had to work. His claim failed and it was said "the course of employment normally begins when the employee reaches the place of work; to extend it to the journey to and from work it must be shown that in travelling by the particular method and route and at the particular time the employee was fulfilling an express or implied term of his contract of service." [18]

Another way of putting the same thing is to say "a person is in the course of his employment only while doing something which he is under an obligation (express or implied) to his employers to do or something incidental thereto," [19] so long as the expression "incidental thereto" is not given too wide a meaning. An interesting case arose in connection with a booking clerk employed by a firm of travel agents who was sent by his employers with an organised tour on an educational visit abroad to improve his knowledge of travel conditions. The party arrived back at an English port and dispersed. While waiting for a train home the clerk had a meal in a hotel and was injured. He was held not to be in the course of his employment when the accident happened.[20] The Commissioner in the course of his decision referred to a previous case of a stove erector who had been sent by his employers to a distant town and had been injured while having a meal on arrival there before going to erect the stove. He had been held to be in the course of his employment not, as the Commissioner explained, because the taking of a meal is in itself necessarily incidental to a man's employment but because in the case of a man sent to a distant place by his employers it is incidental to the performance of his duty that he should take a meal on the way, or, put in another way, the fact that he takes a meal on the way does not of itself break the continuity of the employment. Applying that to the facts in the booking clerk's case the Commissioner said "it would follow that, if it could be accepted in the present case that the claimant was still performing his duty to his employers to travel on this educational tour, the fact that he was taking a meal would not necessarily cause a break in the continuity of his employment; thus it would not cause such a break, if he were having it as a member of the party with the other members. I do not mean by that that the claimant was necessarily continuously in the course of his employment throughout the tour. Whether he was so or not would depend upon whether what he was doing was expressly or impliedly what he was required by his employers to do or something incidental to the performance of that duty. It would not mean, for example, that while he was enjoying some free time on his own visiting, say, the theatre, the continuity of his employment would continue. The difficulty, however, in the claimant's way in the present case is that at the time when the accident which he

[18] Decision R(I) 9/51.
[19] Decision R(I) 22/51.
[20] Decision R(I) 2/53.

suffered occurred the organised party with which he had been sent for educational purposes had dispersed. Thereafter, the claimant was free to go where he would and, though I do not doubt that in the circumstances of his case his desire was merely to get home as soon as possible, he was no longer under any obligation to his employers to travel in any particular way or at any particular time or for any particular purpose; he had become for the time being his own master."

An illustration of an attempt by the Commissioners to follow what they believed to be the trend of recent Workmen's Compensation cases beyond the stage which that trend had reached in 1948 may be found in Decision C.I. 23/49 which relates to an accident to a colliery worker while leaving a pit bath. The claimant was not under an obligation to use the pit baths, but the Commissioner held that the use of them was an incident of such employment and an accident arising as a result of their use was an accident arising out of and in the course of the workman's employment. While leaving the pit bath the claimant it was held had not yet " disentangled himself from his employment." This was going beyond the test of duty to the employer laid down in *St. Helens Colliery Co., Ltd.* v. *Hewitson* [1924] A.C. 59, if the word " duty " is understood in its literal sense, but the Commissioner was encouraged to a wider view of the matter by, for example, the decision of the House of Lords in *Weaver* v. *Tredegar Iron & Coal Co., Ltd.* [1940] A.C. 955, where Lord Maugham found himself in a minority when applying the *Hewitson* test literally. As Lord Atkin pointed out in *Weaver's* case at p. 966, " it is well settled that a man injured while taking refreshment on the premises at a permitted hour . . . is in the course of his employment. It is a wide use of language that permits one to say that in those cases ' he is doing something in discharge of a duty to his employer imposed upon him by his contract of service ' even if you add the words ' directly or indirectly '." And Lord Wright said at p. 977, " he " (the workman) " had not become an ordinary member of the public or disentangled himself from his employment." The Commissioner referred to section 17 (1) of the Mining Industry Act, 1926, which provides that " it shall be the duty of the miners' welfare committee to secure as far as reasonably practicable the provision at all coal mines, to the satisfaction of the committee, of accommodation and facilities for workmen taking baths and drying clothes." In taking a pit bath the Commissioner said the workman " was doing something incidental to his employment and when leaving the baths was still doing something incidental to it. Viewing the matter from a somewhat different angle I think it may fairly be said that the use of the baths was an incident of his departure from his employers' premises in pursuance of his duty to leave the premises on the conclusion of his work." (This was contrary to the decision in *Gaskill* v. *St. Helens Colliery*

Co., Ltd. (1934) 27 B.W.C.C. 32, which applied *Hewitson's* case literally.)

A case which may interest students of international law arose when a claimant, a member of the Kroo tribe who inhabit Sierra Leone, claimed a widow's pension as the widow of a man, also a member of that tribe, with whom she had gone through a ceremony of marriage according to native law and custom. The custom of the Kroo people permitted polygamy, so that the man in question was entitled to take one or more wives in addition to the claimant, although he had not availed himself of that privilege. It was no doubt true to say that the *lex loci celebrationis* had been complied with and that the law of the domicile of the parties to the ceremony of marriage did not prohibit polygamy, but the Commissioners (sitting as a tribunal of three) decided that that did not prove that the claimant was the man's "widow" in the sense in which that word was used in the National Insurance Act, 1946. Having regard to the terms and objects of that Act, they were of opinion that "widow" in that Act meant a woman who was before her husband's death married to him by a marriage in the sense in which that term is used in the law of Great Britain, that is to say, "the voluntary union for life of one man and one woman to the exclusion of all others." They also held that the fact that the man with whom the claimant had gone through a ceremony of marriage had not exercised his right to take a second wife did not affect the matter. "According to the ordinary usage of language" they said "whether a woman has the status of wife or widow depends upon the reciprocal obligations imposed by the ceremony by which she was united to her husband and upon which she relies as her marriage. It is impossible to suppose that the legislature meant that the woman's right to the status of wife or widow for the purposes of section 17 or any other provisions of the Act should depend, not upon the nature of her 'marriage' but upon whether her husband had exercised the rights conferred upon him by the 'marriage.'" [21]

I have concentrated in these few observations on questions of, I hope, general interest, but it must not be supposed that the major part of the Commissioner's time is engaged on the solution of problems arising in relation to matters of such wide application. A considerable number of their decisions are concerned with finding a way through the intricacies of the regulations under the Acts, and with the solution of technical problems. Thus, for example, under the Industrial Injuries Acts there are what are known as "prescribed diseases," that is to say, diseases which if contracted are presumed in certain cases to be due to the nature of a man's employment and, therefore, qualify him for benefits under those Acts. Those diseases are prescribed only in relation to certain groups of persons, namely, those employed in occupations thought to involve

[21] Decision R.(G.) 18/52.

exposure to the risk of contracting the disease. These occupations are described in the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948 [S.I. 1948, No. 1371], as amended from time to time. In order to determine whether a claimant was engaged in a relevant occupation it is frequently necessary to acquire a close appreciation of the work which he was doing. Thus, for example, pneumoconiosis (a disease which embraces silicosis and kindred diseases) is prescribed in relation to a man engaged in an occupation (a) involving the working or handling of quartz, quartzite, ganister, sandstone, gritstone or chert (but not natural sand or rotten rock) or a dry deposit or a dry residue of silica or dried quartzoze sand or any dry admixture containing such materials or (b) involving substantial exposure to the dust arising from such operations. When is quartzoze sand *dried* quartzoze sand in the sense there used? What is an admixture? Does it include a chemical combination containing these materials? If not, does it matter that the particles are compacted and not loose? Again, pneumoconiosis is prescribed in relation to a man engaged in the occupation of moulding iron castings with the use of siliceous materials as a parting powder or facing powder. What are siliceous materials in this context? Silica is one of the commonest substances in nature and a line has to be drawn somewhere. Is the facing sand used in some types of moulding, and which is different in composition from the backing sand, the same thing as facing powder?

All these problems have had to be decided by the Commissioners. They involve very technical matters and no useful decisions could be reached without taking careful steps to understand what one was talking about. Much evidence has had to be heard on such matters and decisions relating to these questions are reported for the guidance of local appeal tribunals and others.

Sometimes the evidence has had to be of a highly technical character. Perhaps the high-water mark was reached when the Commissioner had to decide whether beta naphthylamine was an amido-derivative of benzene or of a homologue of benzene. Did an amido-derivative include an amino-derivative since chemists had used the former term loosely until recent years? Was a homologue to be interpreted in the strict sense of a derivative reached by the addition of one or more CH_2 groups? This case involved as is obvious an appreciation of the chemical structure of a particle of beta naphthylamine, as well as many other technical matters.[22]

I refer to these matters merely to show that the work of the statutory authorities under the Insurance Acts leaves plenty of scope for building a body of case law, for how could local insurance officers or local tribunals throughout the country be expected to arrive at similar decisions in like cases without the assistance of a co-ordinating appellate tribunal?

Archibald Safford.*

[22] Decision C.I. 195/50 (reported).

* M.C., Q.C.; Deputy Insurance Commissioner.

LEARNER'S LICENCE

To simple and bemused travellers brief directions may sometimes be as useful as detailed descriptions of the ground that has been traversed and of the way ahead. To such travellers the following directions are offered by one of their company. Those who prefer a survey to a signpost must seek it elsewhere.[1]

Introduction

1. A new interest, if it is to be capable as such of affecting third parties acquiring land, must be an interest in land—a right *in rem*. The mere recognition of the existence of a new right does not necessarily have this consequence. It may merely be recognised as a right *in personam*.

2. Rights exist in law and in equity. Any new right, if it owes its creation or recognition as a right in land to judicial decision, must be equitable. The categories of legal rights in land are closed by L.P.A., 1925, s. 1 (1) (2) and (3), but there is no insuperable difficulty in the way of the creation by the courts of new equitable rights in land, though the proviso to L. P. A., 1925, s. 4 (1) does present some difficulty.

3. Neither 1 nor 2 above has any application to rights created by statute, which may fall within the traditional classes, or may be of an anomalous nature. The right of the "statutory tenant" is but one example of the latter type (see 18 below).

4. The same situation can give rise to rights *in rem* and to rights *in personam*. In either case some or all of the rights may be legal, or some or all of them may be equitable.

5. Just as all the rights arising from one transaction need not have the same character, so they need not be coextensive. The legal and equitable rights may not be coterminous; the rights *in rem* need not be of the same duration as the rights *in personam*.

Compare: (a) As to options to purchase: so far as the option creates an interest in land it is limited by the perpetuity rule, so

[1] Among the principal articles, which are the sources of this summary, are: "What is a Licence?" by H. W. R. Wade, 64 L.Q.R. 57; "Licences and Third Parties," by H. W. R. Wade, 68 L.Q.R. 337; "The Deserted Wife's Right to Occupy the Matrimonial Home," by R. E. Megarry, 68 L.Q.R. 379; "Licensed Possessors," by Professor A. D. Hargreaves, 69 L.Q.R. 466; "A New Equitable Interest in Land," by G. C. Cheshire, 16 M.L.R. 1; "Interests and Clogs," by Professor Glanville Williams, 30 Can.Bar Rev. 1004; "Digesting the Licence," by O. R. Marshall and E. H. Scammell, 31 Can.Bar Rev. 847; "The Nature and Effect of Licences," by E. O. Walford, 11 *Conveyancer* (N.S.) 183; "Licences and Successors in Title of the Licensor," by Professor F. R. Crane, 16 *Conveyancer* (N.S.) 323; "Possession and the Licence to Occupy Land," by D. Pollock, 16 *Conveyancer* (N.S.) 436. In the presence of this wealth of learned writing little originality can be claimed for what follows save comparative brevity.

far as it creates pure contractual rights, rights *in personam*, it is not so limited. *Woodall* v. *Clifton* [1905] 2 Ch. 257; *Hutton* v. *Watling* [1948] Ch. 26.

(b) As to agreements for a lease: the agreement coupled with the fact of taking possession can give rise to (i) purely contractual rights; (ii) to a legal right *in rem*—a term from year to year; (iii) an equitable right *in rem*—a term for the agreed period. Here the purchaser may be affected by the equitable rights *in rem*, not by the legal rights *in personam*. The legal and equitable rights *in rem* are different in extent.

6. The enforcement of equitable rights *in rem* depends upon notice. The question of notice is regulated either by the provisions of the L. C. A., 1925, or L. R. A., 1925 (where applicable), or elsewhere by general equitable rules.

7. The classification of the effect of the parties' arrangements is a matter for the courts. The words used by the parties are not conclusive. Compare: *Wells* v. *Kingston-upon-Hull* (1875) L.R. 10 C.P. 402; *Milmo* v. *Carreras* [1946] K.B. 306; *Wright* v. *McAdam* [1949] 2 K.B. 744; *Buck* v. *Howarth* [1947] 1 All E.R. 342.

8. A major reform in English land law was worked by the property legislation of 1925.

Lease and Licence: The Background

9. A licence is in origin a contractual or personal right. *Thomas* v. *Sorrell* (1673) Vaughan 330.[2] In suitable cases the rights it confers can be enforced by decrees of specific performance or injunction. *Millennium Productions, Ltd.* v. *Winter Garden Theatre, Ltd.* [1948] A.C. 178.[3]

10. The availability of these remedies does not necessarily convert the right of the licensee into a right *in rem*. Compare: *Hutton* v. *Watling* [1948] Ch. 26, where specific performance was available precisely because the right was *in personam*.

11. At common law exclusive possession is essential for the creation of a tenancy, and, conversely, where exclusive possession is conferred a tenancy of some sort necessarily results even if it be merely a tenancy at will or at sufferance.[4] *Doe* d. *Thompson* v. *Thompson* (1837) 6 A. & E. 721, and compare *Partridge* v. *Bere* (1822) 5 B. and Ald. 604 as to mortgagors.

[2] See "What is a Licence?" by H. W. R. Wade, 64 L.Q.R. 57.

[3] Not all licences are thus enforceable: *Thompson* v. *Park* [1944] K.B. 408. It is not clear if the new interest is only claimed where they are. See 16 M.L.R. at pp. 8–9.

[4] See "Licensed Possessors," by Professor A. D. Hargreaves, 69 L.Q.R. 466. Contrast 16 *Conveyancer* 323. It is here assumed that tenancies at will still exist at law: see Wolstenholme and Cherry, *Conveyancing Statutes*, Vol. 1, p. 322.

Licences with exclusive possession

12. Hence, if a "licence" confers exclusive possession then a tenancy—a legal right *in rem*—will necessarily arise. The description as "a licence" cannot prevent this result (7 above). A third party acquiring the land must be affected by this right, but if the tenancy be at will he can terminate it (subject to any general rules, such as the Rent Restriction Acts). The tenancy need not necessarily be at will. If the duration of the licence is less than three years, a legal term for that period will result (L. P. A., 1925, s. 52). Otherwise the situation is similar to any other where there is an informal grant of an interest in land.

13. In addition to this legal right other rights may arise from the same transaction, which need not be of the same nature or duration (5 above). Thus, if the "licence" term is over three years an equitable term may arise of like duration, which will, if registered as a Land Charge Class C. (iv), bind a purchaser. If unregistered, a purchaser will be unaffected except by the legal tenancy, whether at will or for a greater period if rent has been paid. If the land is registered the situation is as in 34 below.

14. On particular facts an alternative to the situation in 13 may arise. There may be merely a tenancy at will at law coupled with a contractual obligation on one party not to exercise the power of determination. There is nothing inconsistent in this (see 5 above). In this case, while the legal right *in rem* could affect a purchaser, the contractual obligation not to exercise the power to determine could not, the burden of a contract being unassignable. This situation could arise where the construction of the so-called "licence" as an agreement for a term was impossible.[5]

15. The result in 12, 13, and 14 would be invalidated if it could be shown that the cases demonstrate that a licence can exist in its own right as an interest in land, and that the results of the cases are not attributable to the doctrines in 11 and 12 above. This does not appear to be so (see 18–21 below), but if it were, in so far as licence and lease would then cover much the same ground, confusion must arise.

Licences not giving exclusive possession

16. If the licence does not confer exclusive possession no tenancy can arise (11 above). The only possibilities of such a licence creating an interest in land are (a) if the licence could be construed as a grant of an easement, provided that the nature of the user of the land allows this (22 below), and the other requisites for a valid easement are present. If the licence can be construed as an informal grant of an easement then again, as in 13 above, registration under the L. C. A., 1925, will be necessary to bind a purchaser. (b) If the licence cannot be so construed then, since the licence falls outside

[5] See 69 L.Q.R. 475; contrast 16 *Conveyancer* 323.

any existing category of legal or equitable rights in land, it can only exist as a right in land if a new equitable right has been recognised.

The new right on the cases

17. The existence of such an equitable right is claimed [6] and denied.[7]

18. The mark of a right in land—a right *in rem*—is its enforceability against third parties because it attaches to a thing. The modern cases relied on to support the new right are *Old Gates Estates, Ltd.* v. *Alexander* [1950] 1 K.B. 311; *Errington* v. *Errington* [1952] 1 K.B. 290; *Bendall* v. *McWhirter* [1952] 1 All E.R. 1307; *Foster* v. *Robinson* [1951] 1 K.B. 149; *Ferris* v. *Weaven* [1952] 2 All E.R. 233; *Cobb* v. *Lane* [1952] 1 All E.R. 1199; *Street* v. *Denham* [1954] 1 All E.R. 532, and perhaps *Barclays Bank, Ltd.* v. *Bird* [1954] 2 W.L.R. 319. Among older cases are *Plimmer* v. *Mayor of Wellington* (1884) 9 App.Cas. 699; *Beaufort* v. *Patrick* (1853) 17 Beav. 60; *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129; *Rochdale Canal Co.* v. *King* (1853) 16 Beav. 630; *Dilkwyn* v. *Llewellyn* (1862) 4 De G. F. and J. 517. Of these: *Old Gates Estates, Ltd.* v. *Alexander* is concerned with a statutory tenancy the nature of which is peculiar (see *Brown* v. *Min. of Housing and Local Government* [1953] 1 W.L.R. 1370) and can at best be an unsafe foundation for general propositions.[8] In *Errington's* case the legal estate, against which the rights were asserted was still apparently vested in the personal representatives of the licensor who had held that estate. Since these representatives would have been affected even by mere contractual obligations of their testator, there cannot be said to be any true third party in the case who was held bound by a right *in rem*. A somewhat similar objection holds for *Bendall* v. *McWhirter*, which, as an authority for any general proposition, is vitiated by the peculiar position of a trustee in bankruptcy. In *Ferris* v. *Weaven* the absence of a genuine intent to buy was so apparent that little reliance can be placed on it where that element is present. Indeed there was scarcely transfer of ownership in a real sense in that case. The same objections apply to *Street* v. *Denham*. Moreover the result in *Errington's* case as in *Foster* v. *Robinson*, is reconcilable with older doctrines. *Cobb* v. *Lane* is open to the objection that it is inconsistent with authority binding on the Court of Appeal, and is founded upon cases which are themselves open to attack.[9] Among the older cases *Beaufort* v. *Patrick* is explicable on other grounds, there being an appropriation, or sale of the land, of which the third party had notice. *Dilkwyn* v. *Llewellyn* is similarly concerned with the transfer of a

[6] 16 M.L.R. 1.
[7] 68 L.Q.R. 337.
[8] See "The Courts and the Introduction of New Doctrines," by R. E. Megarry, 67 L.Q.R. 505.
[9] 69 L.Q.R. 466.

legal estate. So also can *Rochdale Canal Co.* v. *King* and *Clayton* v. *Ramsden* be construed as concerned with traditional interests in land.

19. Against these can be ranged (a) the old authorities asserting the personal nature of a licence particularly in recent years, *King* v. *David Allen and Sons* [1916] 2 A.C. 54, and *Clore* v. *Theatrical Properties, Ltd.* [1936] 3 All E.R. 483; (b) the *dicta* or decisions to that effect in modern cases which conflict with those referred to in 18 above such as *Hole* v. *Cuzen* [1953] 1 All E.R. 87; *Thompson* v. *Earthy* [1951] 2 K.B. 596; *R.* v. *Twickenham Rent Tribunal, ex p. Dunn* [1953] 3 W.L.R. 517, and, it seems, *Lloyds Bank, Ltd.* v. *Trustees of the property of O., a Bankrupt* [1953] 1 W.L.R. 1460; further even in *Errington* v. *Errington* [1952] 1 K.B. 290 at 296 and *Cobb* v. *Lane* [1952] 1 All E.R. 1199 at 1202 there are denials that the rights there recognised were rights in land.

20. Further to the extent that the new status of licences is dependent upon cases involving the deserted wife, those cases can be only an unsafe foundation since it is not clear that her right is that of a licensee. Compare *Bendall* v. *McWhirter* [1952] 1 All E.R. 1311, *per* Denning L.J., "She is, therefore, only a licensee . . . her occupation is comparable with that of the contractual licensee" with *Old Gates Estates, Ltd.* v. *Alexander* [1949] 2 All E.R. 825, *per* Denning L.J., "the wife is not the sub-tenant or licensee of the husband." Moreover, the authority of these cases as supporting general propositions of law is weakened in so far as they depend upon the peculiarities of the Rent Acts or of the position of husband and wife in respect of tortious actions under the M. W. P. A. (see 18 above and *R.* v. *Twickenham Rent Tribunal, ex p. Dunn* (*supra*)).

The new right on principle

21. If the cases are ambiguous and conflicting and the right of the licensee is not yet clearly established as a right *in rem*, it is permissible to consider the desirability of that result. Here a distinction should be made between contractual licences and the right of the deserted spouse.

Contractual Licences

22. As to the former it can be said: (a) that the law must recognise new rights to meet the needs of a modern society; (b) that whereas, on the one hand, exclusive possession is a prerequisite for a tenancy, on the other, lesser rights may yet be too extensive to allow a right to exist as an easement (*Copeland* v. *Greenhalf* [1952] Ch. 488) and hence that it is desirable that a new intermediate class of rights, possibly freed from the other limitations of easements, should be recognised, as in the past restrictive covenants were so recognised.

23. Against this it may be said: (a) modern society, a society of small property holders, requires cheap and easy conveyancing. If new rights can exist which are not easily ascertainable conveyancing will be neither cheap nor easy, and the essential services of building societies more difficult or more costly to obtain (see *per* Harman J. [1954] 2 W.L.R. at 322). (b) That the 1925 legislation marked a major reform by (as a general rule) making rights not apparent on inspection dependent upon registration for their enforceability against third parties or else overreachable. Hence (i) that further exceptions to these simplifying principles should not be readily admitted, (ii) possession as a means of notice has greatly diminished in importance (compare *Coventry Permanent B/S* v. *Jones* [1951] 1 All E.R. 901), and thus cases such as *Hunt* v. *Luck* [1902] 1 Ch. 428,[10] lose much of their significance; the background against which they were decided has been altered. (c) In the case of the varied rights capable of existing as licences, possession itself can often be little warning of their existence (and compare 28 below). (d) That the admission of new rights inconsistent with former principles is likely to provoke more difficulties than will be solved by that admission. (e) The recent run of cases do not show any situation, incapable of being satisfactorily met on existing principles, and urgently calling for the development of a new right. (f) In so far as the contractual licence confers exclusive possession there is no need for, and indeed (without creating undue confusion) no room for, a new right (see 12 and 13 above). The issue is of great importance therefore only where exclusive possession is not given, and even there the cases do not demonstrate any inadequacy of existing rights such as requires urgent redress.

24. But if a contractual licence is recognised as a right in land then it appears to follow that such rights would be capable of falling within Land Charges Class D (iii). What is here important is what the words of the statute are capable of including as they stand, and not what the draftsman may have had in mind. (Compare *Garner* v. *Burr* [1950] 2 All E.R. 683.)[11] A possible alternative—Class C (iii)—must it seems be ruled out as being more appropriate to charges securing sums of money. The decision in *Lewisham B. C.* v. *Malone* [1948] 1 K.B. 50, does not decide this issue since that case is only concerned with the peculiarities of war-time requisitioning as creating special statutory rights (see 3 above).

25. Hence a rejoinder to 23 could be that the objections in 22 are largely met, if registration is thus possible, since (a) to be valid as a contract the rights created must be certain and intelligible (*British Electrical and Associated Industries, Ltd.* v. *Patley*

[10] Relied on in 16 M.L.R. at p. 10.

[11] In the same way the new interest would necessarily fall within the scope of L. P. A., 1925, ss. 53 and 54.

Pressings, Ltd. [1953] 1 All E.R. 94), and (b) being registrable, the existence of rights is easily ascertainable, the difficulties as to possession as a means of notice are removed (see 24 above) and the purchaser is protected under L. C. A., 1925, s. 13 (2).

26. This rejoinder is not conclusive. It does not meet all objections, and even in those cases where it does the position of the purchaser is not greatly simplified so long as the Registrar does not regard it to be one of his primary functions to decide the validity of charges the registration of which is sought. Registration alone does not at present imply validity,[12] and while it is true that at present similar difficulties can be met in connection with, *e.g.*, restrictive covenants, the purchaser's difficulties when dealing with the present undefined group of rights could be considerable, and in view of the considerations in 23 outweigh the advantages of admitting the new category of rights as rights *in rem*.

The deserted spouse

27. As to the right of the deserted spouse, it seems that the position as in 11 and 12 cannot arise, the wife's claim is against the husband and against him she has no exclusive possession, indeed there is a power in the court to order his return, and, in cases of simple desertion, the wife can only be deserted if she does not exclude the husband. So against third parties she is asserting rights through him (*Lloyds Bank, Ltd.* v. *Trustees of the Property of O., a bankrupt* [1953] 1 W.L.R. 1460 at 1466, *per* Upjohn J.).

28. As to the recognition of her rights as rights in land the objections in 23 apply with greater force. The rights of the deserted spouse appear to depend on (a) the validity of the marriage; (b) on the fact that she is deserted; (c) on the absence of any subsequent matrimonial offence on her part; (d) seemingly on the continuance of the marriage, *i.e.*, on the absence of divorce, annulment, or the death of the other spouse. None of these matters may be readily ascertainable, and as to (b) it must be remembered that under the doctrine of constructive desertion the party who leaves may be the deserted party. Possession is inadequate notice since capable of other more obvious explanations. Indeed, since possession is now only of limited force as a means of notice (see 23 (1) above) it is undesirable to admit other instances which can, in time, only reproduce all the complexities of constructive notice happily reduced by the 1925 legislation. The claims of recognition of this new right as a right in land can only be admitted at the cost of denying basic principles of the outstanding reform of English land law.

29. The public interest in the maintenance of the simplified system of land law outweighs the public interest in providing for deserted spouses (whose claims to sympathy may often be more

[12] Compare the remarks in *Re Ridgeway and Smith's Contract* [1930] 3 V.L.R. 111 as to the effect of registering a verse of the *Rubaiyat* of Omar Khayyam.

apparent than real) through a new right *in rem*; those arguments in no way weaken claims *in personam* which the deserted spouse may have against the other.

30. If it is desired to confer rights on spouses in the matrimonial home then the proper course is to deal specifically with this issue through the introduction of a regime of matrimonial property and thus not prejudice general principles of land law. Whether such a course is justified in view of the existing remedies is arguable (see 32 below). If it is considered desirable to confer rights in property as a result of marriage the reform should be a legislative one, but it is not a difficult one to accomplish within the existing conveyancing machinery. Rights should however spring from the marriage, and not, as suggested in *Lloyds Bank, Ltd.* v. *Trustees of the property of O., a bankrupt* and *Barclays Bank, Ltd.* v. *Bird*, from the break-up of the marriage (see *per* Sholl J. in *Brennan* v. *Thomas* [1953] A.L.R. 214).

31. The cases being ambiguous, the practical objections to the recognition of the wife's rights as a right *in rem* being strong, and the balance of public policy being against it, the right should not be admitted as a right in land until binding unambiguous authority compels that course, or there is a legislative reform. Her right of residence in the matrimonial home should be considered as a right of maintenance in kind, the counterpart of the right of maintenance in cash. Just as the wife has no right *in rem* enabling her to follow her husband's money into the hands of third parties, so also she has no right *in rem* against the house. In both cases her right is of the same nature.[13]

32. Three further possibilities should be considered in the case of the deserted spouse.

(a) Where, when the husband leaves the wife, an arrangement is made that she shall be entitled to reside in the house to the exclusion of the husband, then, the interest of the wife being one for life determinable on an event, the transaction falls within the definition of a settlement in S. L. A., 1925, s. 1, the wife being capable of being regarded as tenant for life under S. L. A., s. 19. If there is no more than an agreement, then there is an informal settlement and hence, by S. L. A., s. 11, the provisions for registration of the agreement as an estate contract are made applicable and a purchaser will therefore be protected in the absence of registration. The machinery of the S. L. A. appears inapplicable where there is no agreement, the wording of the Act being only appropriate to situations springing from an agreement or an instrument.

(b) If the wife is present under an order of the court (when exclusive possession might be given) the situation is, it seems, already governed by the L. C. A., s. 6 (dealing with the registration of

[13] See the analogies drawn by Sholl J. in *Brennan* v. *Thomas* [1953] A.L.R. 214, with the wife's rights over her husband's goods.

writs or orders affecting land). The wife can protect her rights by registration of the order and the purchaser would be protected under L. C. A., s. 7 (1) in the absence of such registration.

(c) If there is no agreement the wife may seek and obtain an injunction against the husband restraining him from selling the house over her head. *Lee* v. *Lee* [1952] 2 Q.B. 489n. Again the resultant order falls within the L. C. A., s. 6.

33. Hence adequate remedies are already available to the wife who takes proper steps without the invention of a new right, and the existence of such a right should not be admitted, save as in 30 above.

Registered land

34. The situation in regard to registered land must be separately considered, since L. R. A., 1925, s. 70 confers protection (subject to qualifications) on overriding interests which include the rights of persons "in actual occupation." Although the word "rights" here used is ambiguous, it seems that in the context, and having regard to the opening words of the section, it can only refer to rights in land. Hence the right of the licensee, not being such a right, does not receive protection under L.R.A., s. 70 (1) (*g*) or 70 (1) (*k*) whichever is appropriate. (Compare *Cowell* v. *Rosehill Racecourse Co., Ltd.* (1937) 56 C.L.R. 605, and see *Woolwich Equitable B/S* v. *Marshall* [1952] Ch. 1; *City Permanent B/S* v. *Miller* [1952] 2 All E.R. 621.) The situation of the licensee is therefore no stronger here than it is in relation to unregistered land. If his "licence" gives exclusive possession he is protected. If it does not he has no interest in land and the fact that the land concerned is registered does not increase his rights. In the same way the deserted spouse derives no protection merely by the fact of occupation but, provided appropriate steps are taken, may obtain it under the ordinary rules.

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FREEDOM OF RELIGION AND SPEECH
AND THE
UNITED STATES SUPREME COURT

FIVE years ago R. H. Pear discussed, in this *Review*,[1] a number of recent decisions of the U.S. Supreme Court which dealt with religious freedom under the First Amendment of the U.S. Constitution.[2] The article concluded with an analysis of the Illinois "released time" case[3] in which arrangements made by school authorities at Champaign, Illinois, for religious instruction in public schools to be conducted by private teachers of the various faiths were held to be contrary to the First Amendment. Whether one agreed with this decision or not, it had the virtue of settling the constitutional relationship between State and Church in a clear-cut manner. Four years later, in the New York "released time" case,[4] the same court threw the matter back into hopeless confusion.

The principal significance of the *McCollum* case lay in the fact that eight out of nine justices interpreted the First Amendment as banning not only the preferential treatment of one religion compared with another but also all measures supporting religion, including those supporting all religions.[5] Few decisions have been the subject of controversies as bitter as that developing out of this case. Its opponents, among them many Catholic groups, attacked it as being hostile to religion and therefore in conflict with the religious nature of the American people. Its supporters referred to the writings of Jefferson and of Madison to show that the First Amendment was

[1] "The U.S. Supreme Court and Religious Freedom," 12 *Modern Law Review* 167.

[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." It is settled law that the prohibitions of the First Amendment, in particular those against abridgment of freedom of religion, speech and the press, are not only binding on federal authorities, but applicable to state authorities through the "due process" clause of the Fourteenth Amendment: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law."

[3] *McCollum* v. *Board of Education* (1948) 333 U.S. 203.

[4] *Zorach* v. *Clauson* (1952) 343 U.S. 306.

[5] "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion to another. . . . the clause against establishment of religion was intended to erect a 'wall of separation' between Church and State." This definition was first laid down in *Everson* v. *Board of Education* (1947) 330 U.S. 1, discussed in Pear's article, *supra*, at pp. 177–80. That decision, however, aroused much less attention than the *McCollum* case, mainly because the court then held that the practice complained of (refund by school authorities of school bus fares paid by parents of children attending parochial schools) did not amount to "establishment of religion" as defined by the court. In the *McCollum* case, however, the actual determination demonstrated the broad nature of the definition.

intended to bring about a complete separation of State and Church, and that this was in the best interest of both.[6]

Like the Champaign scheme, the New York "released time" programme provided that, on written request of their parents, children attending public schools could be "released" once a week one hour before the normal closing time to receive religious instruction at the respective religious centres and not—this distinguished the case from the *McCollum* case—in the school buildings. Normal instruction was to continue for children not "released," and the centres for sectarian instruction were asked to report to the schools those who had been "released," but failed to attend. Taxpayers and parents challenged the constitutionality of this scheme, but their suit was unsuccessful in the New York courts, and the United States Supreme Court dismissed their appeal.

Justice Douglas, delivering the majority opinion in which six out of nine justices concurred, distinguished the *McCollum* case on the ground that the New York programme did not involve the use of public school rooms or the expenditure of public funds. The programme, he said, did not abridge the "free exercise" of religion guaranteed by the First Amendment because there was no coercion. It would be different if the teachers compelled their pupils to attend the religious classes. Nor did Justice Douglas consider the New York plan to be a measure "respecting an establishment of religion." The First Amendment, he thought, reflected the idea of separation of Church and State, but only in the sense that it prohibited any interference with the "free exercise" of religion on the one hand, or an "establishment" on the other. He mentioned that in many ways, such as exemption of churches from taxation, police and fire protection rendered to religious groups, prayers in legislative assemblies, the appeal to the Almighty in the messages of the President, the State did in fact co-operate with the Church, and he denied that there was any essential difference between the practice of occasionally releasing individual pupils for attending mass or observing a religious holiday and the "release" under a systematic programme. He regarded the encouragement of religious instruction and the co-operation with religious authorities as being in accordance with "the best of our traditions" and with the religious nature of the American people, and the opposite view as a preference of those who believe in no religion to those who believe. The Constitution, he said, did not require the government "to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence," and the separation of Church and State did not mean "that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people."

[6] ". . . the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere": *McCollum* case, *supra*, at p. 212.

This concept of the relation between State and Church differs greatly from that underlying the *McCollum* decision to which Justice Douglas claimed to adhere. In the *McCollum* case the court laid down that Church and State had to keep aloof and that the latter had to maintain neutrality between believers and non-believers, but in the *Zorach* case the majority insisted on the desirability of co-operation between the State and various religious groups in the interest of promoting religion. It is not surprising that attitudes as profoundly different as these resulted in conflicting interpretations of the First Amendment, but it would have been less difficult to appraise the majority decision in the *Zorach* case if the court had overruled the earlier decision instead of paying lip service to it. In both cases the " released time " programmes were intended to, and did, aid religious groups, and utilised the State's public school system to provide pupils for religious instruction, despite the difference as to the localities where it took place. In effect the court did, in the second case, repudiate the interpretation of " establishment of religion " as including State aid to religion which it had adopted in the first, but it failed to formulate a new definition of "establishment of religion," and thus left the law without guidance for the application of the First Amendment in future cases.

The three dissenting opinions written by Justices Black, Frankfurter and Jackson, all of whom had supported the *McCollum* decision,[7] show how strongly these justices felt about what they regarded as the abandonment of one of the pillars of the American Constitution, the separation of State and Church. They all emphasised that the state of New York was in fact using its compulsory education system so as to provide pupils for religious sects and this, said Justice Black, the author of the majority opinion in the *McCollum* case, was " not separation but combination of Church and State." As Justice Frankfurter pointed out, it would have been different, had the schools been entirely closed so as to, *i.e.*, leave everybody free to make what use he would of the time thus gained,[8] but, as it was, the system meant that the schools were used " as the instrument for security of attendance at denominational classes " or, as Justice Jackson put it, " as a temporary jail for a pupil who will not go to church." Justice Black rejected the idea that the religious nature of the American people required

[7] In addition to these three justices, the majority in the *McCollum* case consisted of Chief Justice Vinson and Justices Douglas and Burton (all three of whom supported the majority opinion in the *Zorach* case) and Justices Rutledge and Murphy, who have since died. Justice Reed, the lone dissenter in the *McCollum* case, joined in the *Zorach* majority decision, as did the two new justices, Clark and Minton.

[8] This refers to the " dismissed time " scheme which has been recommended as a constitutionally unobjectionable substitute for " released time." " Dismissed time " means that the school closes an hour earlier one day a week so as to allow the children to go where they please and to participate in religious instruction if they like.

the validation of the New York programme or that opposition to the New York plan was prompted by opposition to religion. He traced the principle of separation back to the fact that " eighteenth-century Americans were a religious people divided into many fighting sects." " State help to religion," he said, " injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed, under cover of the soft euphemism of ' co-operation,' to steal into the sacred area of religious choice." And, in a similar vein, Justice Jackson, accused his " evangelistic brethren " of confusing " an objection to compulsion with an objection to religion." " It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar." Of the judgment itself he said that it would " be more interesting to students of psychology and of the judicial processes than to students of constitutional law."

Shortly after it had given its ruling in the *Zorach* case, the Supreme Court had another opportunity of deciding a case touching the relation between religion and the State. The unanimity of the decision in *Burstyn* v. *Wilson* [9] provides a striking contrast to the sharp and emphatic dissensions which marked that in the *Zorach* case.[10]

A law of the state of New York requires a licence for all films to be publicly exhibited and authorises the state education department to refuse a licence for a film which is " obscene, indecent, immoral, inhuman, sacrilegious or of such a character that its exhibition would tend to corrupt morals or incite to crime." The New York authorities revoked a licence to exhibit the Italian film *The Miracle* [11] by reason of its being " sacrilegious," and the New York courts dismissed an action by the distributors aiming at a review of this decision. The Supreme Court unanimously upheld an appeal which attacked the constitutionality of the New York statute as an abridgment of the freedom of speech and of the press, guaranteed by the First and Fourteenth Amendments, as a violation of freedom of religion, and, by reason of the vagueness and indefiniteness of the term " sacrilegious," as an infringement of the due process clause of the Fourteenth Amendment.

[9] (1952) 343 U.S. 495.

[10] Another case dealing with a religious subject—the constitutionality of Bible reading in public schools—was disposed of by the Supreme Court on jurisdictional grounds: *Doremus* v. *Board of Education* (1952) 342 U.S. 429.

[11] *The Miracle* is the story of a poor simple-minded girl who while tending a herd of goats meets a bearded stranger whom she believes to be St. Joseph, her favourite saint. The stranger plies the girl with wine and then ravishes her. When she later finds that she is pregnant she believes that " it is the grace of God." The villagers deride her for her strange behaviour, and finally, shunned by everybody, she flees to the church, where she bears her child. The film was denounced by various Catholic groups as blasphemous. Cardinal Spellman termed it " a despicable affront to every Christian," adding: " We believe in miracles. This picture ridicules that belief."

The opinion of the court, which was delivered by Justice Clark, was based on the "free speech" and "free press" aspect of the case. Motion pictures were held to be within the constitutional guarantees of these freedoms, in that they are "a significant medium for the communication of ideas," "an organ of public opinion" the importance of which is "not lessened by the fact that they are designed to entertain as well as to inform." The court overruled a decision of 1915 [12] according to which the exhibition of films, being "a business pure and simple" was not covered by the First Amendment. Operation for profit, it was now held, did not prevent motion pictures, any more than it prevented books, newspapers or magazines, from being a form of expression whose liberty was safeguarded by the Constitution.

Nor was there any justification in the present case for applying any of those exceptions which restrict the freedom of speech and of the press.[13] It was for the state of New York to demonstrate that this was an "exceptional case," and the burden was heavy because this was a case of censorship by prior restraint, a method of suppressing ideas to be especially condemned.[14] The New York courts had defined "sacrilegious" as "treating a religion as that word is understood by the ordinary, reasonable person, with contempt, mockery, scorn and ridicule." This was, the Supreme Court held, a "broad and all-inclusive definition." It meant that the censor's authority to suppress a film was "far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society." "The censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no chart but those provided by the most vocal and powerful orthodoxies." He would inevitably tend to ban the expression of unpopular sentiment sacred to a religious minority and the application of such test might therefore raise questions relating to freedom of religion. "The state has no legitimate interest in protecting any or all religions from views

[12] *Mutual Film Corp.* v. *Industrial Commission of Ohio*, 236 U.S. 230.

[13] One exception covering utterances likely to create "a clear and present danger that they will bring about the substantive evils the government has a right to prevent" has been applied in recent cases dealing with the validity of legislation against subversives. See *Dennis* v. *U.S.* (1951) 341 U.S. 494, in which the conviction of thirteen leading Communists under the Smith Act of 1940 was affirmed. Another exception applies to certain classes of speech, including "the lewd and obscene, the profane, the libellous and insulting or 'fighting' words": *Chaplinsky* v. *New Hampshire* (1942) 315 U.S. 568.

[14] Early in 1954 the Supreme Court, on the authority of its decision in the *Miracle* case, reversed two more judgments upholding censorship of movies: *Superior Film* v. *Dept. of Education of Ohio*; *Commercial Pictures Corp.* v. *Regents of University of State of New York*. In one case a film had been banned as "immoral," in the other as "harmful." No opinion setting forth the court's views accompanied the Supreme Court's decision. However, a concurring opinion by Justices Douglas and Black stressing the irreconcilability of freedom of press, as guaranteed by the Constitution, and censorship, suggest that the other judges took a less sweeping view and merely regarded "immoral" and "harmful" as unsuitable standards for exercising censorship.

distasteful to them. It is not the business of government in our nation to suppress real or imagined attacks upon particular religious doctrine, whether they appear in publications, speeches or motion pictures." In his concurrent opinion, Justice Frankfurter emphasised that "in America the multiplicity of ideas of 'sacredness' held with equal but conflicting favour by the great number of religious groups makes the term 'sacrilegious' too indefinite to satisfy constitutional demands based on reason and fairness." Other than in a country with a "monolithic religion," such as "the Rome of the late Emperors, the England of James I or the Geneva of Calvin, and today in Roman Catholic Spain (or) Mohammedan Saudi Arabia" the category of "things sacred" does not, in America, have "clearly definable limits."

The ruling of the court, though ostensibly based upon freedom of speech and of the press, was thus influenced by the rule guaranteeing freedom of religion. Had the case been held to fall within any of the exceptions to freedom of speech and of the press, the censor would have been able to favour one religion over another, *i.e.*, to meddle in religious matters. This was stressed by the court and the protection of freedom of religion is thus in fact an essential part of the *ratio decidendi*. The New York censorship law inevitably led to the state's taking sides in religious disputes, but, in the opinion of the court, the "released time programme" did not, and this may explain the opposite conclusions reached in the two cases. The standard applied in each case seems to have been whether the law opened the way for the state to abandon its religious neutrality. The decision in the *Miracle* case was followed, shortly afterwards, in another film case *Gelling* v. *Texas*.[15]

The courts have been particularly sensitive to the suppression of free speech by censorship in the form of prior restraint of which the *Miracle* case and *Gelling* v. *Texas* were examples. In other recent decisions of the Supreme Court touching upon freedom of expression this element was absent. In *Adler* v. *Board of Education*[16] the court, by a six to three majority, upheld the constitutionality of a recent New York statute aiming at the elimination of subversive teachers from public schools. A person who, under the procedure set up by the statute, was disqualified from employment in public schools by reason of membership in a subversive organisation was held not to have been denied the right of free speech and assembly. "His freedom of choice between membership in the organisation and employment in the school

[15] (1952) 343 U.S. 960. A film exhibitor had been convicted by the Texas courts for showing a film which the local board of censors had refused to licence on the ground that, in the opinion of the board, it was "prejudicial to the best interests" of the people of the city. The film was about a Negro girl who passed as white and became engaged to a white man. He retains his love for her after he learns that she is a Negro. She decides to live with her Negro family.

[16] (1952) 342 U.S. 485.

system might be limited, but not his freedom of speech and assembly except in the remote sense that limitation is inherent in every choice." Justices Black and Douglas, dissenting, held that, under the statute, teachers could be penalised for their associations and their thoughts rather than for overt acts of disloyalty. Citizens who entered the public service, they argued, did not thereby sacrifice their fundamental rights, and they concluded that the statute violated the teachers' freedom of thought and expression guaranteed by the First and Fourteenth Amendments.[17]

In *Beauharnais* v. *People of the State of Illinois*,[18] on the other hand, the court was faced with a law directly aimed at the suppression of certain types of utterances, *viz.*, the publication of group libel, though not through prior restraint as in the *Miracle* case, but through subsequent punishment. In this case, other than in *Adler* v. *Board of Education*, the court was unable to avoid the issue of free speech. Beauharnais, a propagandist for white supremacy, circulated a leaflet in the form of a petition calling on the municipal authorities of Chicago to halt further encroachment by Negroes upon white people and their property and referring to "the white race becoming mongrelized by the negro" and to "aggressions . . . rapes, robberies, knives, guns and marijuanas of the negro." He was convicted by an Illinois court for violating a statute of that state of 1917, prohibiting the publication of matter exposing racial and religious groups to contempt, derision or obloquy.[19] By a majority of five to four the U.S. Supreme Court upheld the conviction and decided that the statute did not violate the defendant's constitutional rights. The majority whose opinion was delivered by Justice Frankfurter took the view that group libel was but a kind of libel and thus within the well-recognised exemption of libellous utterances from the protection of free speech and free press.[20] It might have been different, had this been "a wilful and purposeless restriction unrelated to peace and well-being of the state," but the history of race tension and violence in Chicago showed this to be a justifiable method of curbing "false

[17] In order to discuss the case in detail it would be necessary to discuss the other ground on which the constitutionality of the statute was attacked, namely, that the presumption of guilt it derived from membership in an organisation listed as subversive violated due process of law. Justice Frankfurter's dissent was based on jurisdictional grounds.

[18] (1952) 343 U.S. 250.

[19] Only few of the states have enacted group libel laws. In addition to Illinois such laws are in force in Colorado, Connecticut, Florida (limited to anonymous publications), Indiana, Massachusetts, Oregon (limited to campaign literature), West Virginia (limited to pictures and theatrical acts). A New Jersey group libel law was declared unconstitutional by the highest court of the state by reason of vagueness: *State* v. *Klaprott* (1941) 127 N.J.L. 395.

[20] See above, note 13. Libel of individuals is a crime in all the forty-eight states, either at common law or under statute. See Justice Frankfurter's opinion in the *Beauharnais* case, *supra*, at p. 255. It has never been doubted that the validity of these laws is not affected by the constitutional guarantees of free speech and freedom of the press which serve to protect the discussion of public matters.

and malicious defamation of racial and religious groups made in public and by means calculated to have a powerful emotional impact on those to whom it was presented." The legislature may choose between policies aiming at the reduction of racial and religious tension " not unrelated to the problem and not forbidden by some explicit limitation of the State's power." It has the right to experiment with social issues and even to commit errors in so doing. Group libel legislation can be justified not only as a method of maintaining peace and order but also as a means to protect individuals from loss of standing through attacks on the groups to which they belong. That such legislation might be misused to stifle freedom of discussion was no ground to deny this power when no actual abuse of power had occurred. The court did not wish to affirm the wisdom or the efficiency of group libel legislation, and expressed its doubts on this score, but " it is not for us . . . to make the legislative judgment. We are not at liberty to erect these doubts into fundamental law."

In their dissenting opinions Justices Reed and Jackson agreed that the states may enact group libel legislation, but Justice Reed held some of the words in the Illinois statute to be too vague to serve as a basis for conviction and Justice Jackson saw a violation of due process of law in the denial of the right to raise constitutionally guaranteed defences such as justification, fair comment, and privilege. The dissents delivered by Justices Black and Douglas, on the other hand, strike at the root of the majority opinion. These two stalwart defenders of a broad interpretation of freedom of speech and of the press continued in the present case their fight against what they considered as unjustified encroachment on those freedoms resulting from various Supreme Court decisions in recent years.[21] Justice Black denounced the application of the " rational basis " test to a question involving freedom of expression which, in earlier cases, had been held to be more than a mere guarantee against legislation without rational basis.[22] He denied that any legislature had the power to decide " what public issues Americans can discuss " or to make experiments " in curbing freedom of

[21] See, *e.g.*, their dissenting opinions in *Dennis* v. *U.S.* (1951) 341 U.S. 494, and in *American Communications Association* v. *Douds* (1951) 339 U.S. 382.

[22] *Board of Education* v. *Barnette* (1943) 319 U.S. 624. The " rational basis " test or test of reasonableness is often used to determine whether legislation is invalid as violating " due process " in the substantive sense. The view expressed in *Board of Education* v. *Barnette* that the freedoms of speech, press, assembly and worship may not be infringed on such " slender grounds " as those implicit in the " rational basis " criterion is based on the doctrine fully developed in *Thomas* v. *Collins* (1945) 323 U.S. 516, that the freedoms of the First Amendment are in a " preferred position " compared with other constitutional rights. In *Thomas* v. *Collins* the Supreme Court held that in view of the " preferred position " the usual presumption in favour of the constitutionality of a statute did not operate where a statute was attacked by reason of its conflicting with the First Amendment. Justice Frankfurter is strictly opposed to the " preferred position " doctrine. See his dissent in *Kovacs* v. *Cooper* (1949) 336 U.S. 77.

expression," and he also denied that there was any analogy in this respect between individual libel "involving no more than purely private feuds" and group libel. It was not enough that abuse of group libel laws could be thwarted if it arose and he did not agree that "the Constitution leaves freedom of petition, assembly, press or worship at the mercy of a case-by-case, day-by-day majority of the court." Justice Douglas added that group libel law might be justifiable in the face of a "clear and present danger" [23] which, despite the distasteful character of the pamphlet, did not exist in the case before the court.

Finally, a recent decision should be mentioned in which the Supreme Court had to deal with an unusual aspect of freedom of speech,[24] *viz.*, the question whether the passengers of the streetcars and buses in the Federal capital were, as "captive audiences," deprived of their freedom of speech by the playing of radio programmes consisting of music, short commercials and announcements. Justice Burton, delivering the opinion of six out of eight justices,[25] rejected this contention in the absence of evidence that the programmes interfered substantially with the passengers' conversation. He refused to decide whether the First Amendment guaranteed "a freedom to listen only to such points of view as the listener wishes to hear" which would have been relevant only if the programmes had been used for "objectionable propaganda." Justice Black did not share this view, and dissented to the extent to which the infliction upon the passengers of programmes other than music (*i.e.*, news, speeches, propaganda of all kinds) was held by the majority to be compatible with the First Amendment.[26]

If freedom to listen or not to listen is the logical counterpart of freedom of speech, it is difficult to see why it should be limited to "objectionable propaganda." Since freedom of speech means freedom to choose what to speak about, freedom of listening should, it is submitted, mean freedom to choose what to listen to. Furthermore, who is to decide whether a broadcast is "objectionable propaganda"? These points still await clarification.

Justice Black's view seems sounder than that of the majority.

Paul Hartman.*

[23] See note 13, above.
[24] *Public Utilities Commission* v. *Pollak* (1952) 343 U.S. 451.
[25] Justice Frankfurter disqualified himself on the ground that being a victim of the practice in controversy his feelings were too strongly involved.
[26] Justice Douglas dissented on the ground that the practice in controversy violated due process guaranteed by the Fifth Amendment against interference by federal authorities.

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ACCURACY AND INACCURACY IN PROFIT CALCULATION

I

The Revenue case, *Patrick* v. *Broadstone Mills, Ltd.*,[1] should be of interest to practising lawyers, to jurists and to economists, for, in the writer's opinion, and with respect, the Court of Appeal, by affirming Vaisey J.'s decision (which reversed the decision of the Special Commissioners of Income Tax) (a) failed to follow a long-standing precedent of the House of Lords; (b) provided an interesting case of judicial legislation in economic matters; (c) introduced a new uncertainty into Revenue law, and, therefore, into the pursuit of business, and (d) thereby raised important questions of principle with respect to the drafting, and subsequent judicial interpretation, of statutes relating to economic matters where measurement is involved.

The facts are complex, and merit a fairly lengthy exposition in order that the essential nature of the issue at stake may be laid bare.

II

The business of the company was cotton spinning. In order to carry on the business it held stocks of raw cotton. At any given time some of this cotton clothed the spinning machines and some waited by the machines, ready for use. A certain minimum physical quantity of both of these categories of stock was held in order to ensure continuity of production. This minimum quantity was called the Base Stock. Additional stocks were sometimes held, but were not relevant in this case. The question at issue was how the Base Stock should be valued for profit calculation purposes under the Income Tax Acts.

In order to calculate annual profit for income tax purposes it was, of course, necessary to deduct from the company's sales revenue, *inter alia*, a figure in respect of the cost of the cotton used in order to produce the yarn that was sold. The problem the court had to decide was, in essence, how this deduction was to be calculated. The company, in effect, calculated its gross profit in any year by deducting from its sales revenue the money outlay occasioned by the need to replace the raw cotton embodied in the

[1] [1954] 1 W.L.R. 158.

yarn sold.[2] In any given year it did not consider it had made a profit until it had recovered sufficient money to maintain the level of the Base Stock.

As a matter of arithmetic, effect could be given to the above view of profit either by leaving the Base Stock out of the profit calculation altogether (*i.e.*, by omitting it from the trading account) or by bringing it into the profit calculation, but at a constant valuation (which normally would represent the cost of the Base Stock when first set up, perhaps many years ago), so that the same amount was first added and then deducted in the account.[3] In either case the effect would be to calculate the profit by deducting from the sales revenue the outlay for the period in question in replacing the cotton sold.[2]

On the other hand, the more usual methods of accounting for stock measure the cost of goods sold in a given year by some kind of approximation to the outlay originally incurred on the physical stock embodied in the goods sold. In a relatively small number of cases the goods sold are actually identified with particular lots of raw material and their cost fixed accordingly. More commonly, the cost will be determined by averaging in some arbitrary way the price of goods in stock at the beginning of the period and of goods bought during the period; or it may, for example, be assumed that the first lot of materials coming into stock will be the first to go out into production ("first in, first out"), and be priced accordingly; and there are other methods. The arithmetic involves the apportionment of part of the outlay on purchase of materials during the accounting year to the closing stock, an appropriate credit being made in the trading account; while the value of the opening stock, derived from purchases in the previous year, is added to the expenses in the trading account. To the cost calculated in one of these ways will be added the amount, if any, by which, on a bona fide estimate, the corresponding valuation of the closing stock exceeds its "market value" (the interpretation of which also varies). These methods are described collectively as the "cost or lower market value" basis of stock valuation.

It is thus apparent that "cost or lower market value" is, strictly speaking, not a method of valuation, but a rather ill-defined set of methods. The interpretation put upon "cost" and

[2] It can be assumed, for the purpose of the discussion, that the quantity of raw cotton bought always equalled the quantity embodied in yarn sales, or, in other words, that the company did not hold any other stocks than the Base Stock. The company did, in fact, hold additional stocks, but there was no dispute about their valuation or about the "cost" of yarn sold so far as its production absorbed stock held in excess of the Base Stock.

[3] In fact, the Base Stock on the machines was omitted entirely from the trading account and the Base Stock awaiting use alongside the machines was brought into the trading account at a fixed price. In both cases the arithmetical result in any given year was, of course, the same.

"market value" varies, and the choice of interpretation is arbitrary. The recommendation on the valuation of stock in trade issued by the Council of the Institute of Chartered Accountants lists no less than five ways of calculating "cost" and two ways of calculating "market value" for the purpose of a "cost or lower market" valuation.[4] Even if the many possible sub-classifications are ignored, this gives ten possible combinations. This is of some relevance in view of the emphasis laid by the court, as will be seen, on the concept of "accuracy" in profit calculation, with the consequent implication that there must be a "best" method of stock valuation.[5] The court did not select for approval any particular definition of cost or lower market value.

When a "cost or lower market" valuation is used, the amount deducted from sales revenue will, in a period in which prices are rising, usually be less than the amount needed to replace the stock embodied in the goods sold; for the amount so deducted will reflect costs of purchases at a rather earlier date, when prices were lower. When prices are rising the more usual form of profit calculation will thus produce higher "profits" than the Base Stock method, and, within limits, contrariwise when prices are falling.

A further implication of the Base Stock method, noted by a Revenue witness, is the fact that where this method is used the balance sheet fails to reveal a "hidden reserve." In this, however, the Base Stock method differs from others only in degree; it is common knowledge that, except when prices have fallen, most balance sheets fail to record part of the market value of the assets, including stock, that they list, since these are usually not included at a figure in excess of cost.

It may be noted that whatever method may be followed, the "hidden" value must eventually be brought into account for tax purposes when the business use of the stock comes finally to an end.[6]

III

The Revenue's case rested, essentially, on the contention that, in consequence of the company's method of stock valuation, the accounts failed to show the "full amount of the profits"[7] of the relevant accounting year.

No particular significance appears to attach to the word "full"

[4] Recommendation X of Recommendations on Accounting Principles of the Institute of Chartered Accountants in England and Wales.

[5] Indeed, one of the *curiosa* of this case is that it is possible to argue that the Base Stock method *is* a variant of the cost or lower market method of valuation, since the Base Stock is in fact normally valued at the cost, in the market, of raw material acquired at some date in the past, and is retained at that value subsequently, provided it does not exceed the current market valuation (on some interpretation of "market value").

[6] Under Income Tax Act, 1952, s. 143.

[7] See Income Tax Act, s. 127.

and it was not used by Singleton L.J.[8] in the passages which appear to contain the kernel of the court's judgment.[9]

Singleton L.J.'s reasoning can, if it has been correctly understood, be summarised thus:

(1) The correct method of calculating profit is that which gives the most accurate result.

(2) It is not possible to calculate profit accurately without taking into account the value of stock at the beginning and at the end of the relevant accounting period.

(3) The most accurate method of valuing stock for this purpose is to take it at cost or lower market value.

It followed that, as the company had used the Base Stock method of valuation, it could not succeed, and the Special Commissioners, in deciding otherwise, had misdirected themselves in law.

In essence, therefore, Singleton L.J. held that the company's case failed because it depended upon a method of profit calculation less accurate than that proposed by the Revenue.

In the following passages it is hoped to show that, with respect, this reasoning is neither in accord with precedent nor a satisfactory interpretation of the statute law.

Accuracy is a word to which no significance can be attached until it has been decided what it is that is being measured. It is not, for example, helpful to say, *before it has been agreed how long a mile is*, that such and such a measure is more accurate than another for the purpose of determining a mile.[10] To define "profit" by saying it is that which is obtained by using the most accurate measure is to commit an error of logic. Accuracy would, no doubt, have had a meaning if the court had been applying the rules of some standard method of profit computation founded on the relevant statute. It is well known, however, that the Income Tax Acts are silent on what constitutes profit, and the courts have, hitherto, tended to avoid the suggestion that the statute is satisfied by a standard set of accounting procedures and by no other.

Were the question "What is profit?" to be decided *ab initio* it may be that the courts would feel that, in order to ascertain the intention of Parliament, as expressed in the words of the statute, they should have recourse to those most concerned with investigating economic phenomena in a dispassionate way. It was long ago decided, however, in the House of Lords, that the views of political economists as to what constitutes "profit," however

[8] The discussion here is confined to the first judgment, delivered by Singleton L.J. Of the concurring judgments, that of Birkett L.J. did not break additional ground and that of Hodson L.J. was limited to the expression of concurrence.

[9] At pp. 173–4.

[10] This implies being able to describe a given *operation* or *procedure*, such as laying down a particular, legally approved or otherwise generally accepted, yardstick one thousand seven hundred and sixty times.

worthy of attention in other respects, are not relevant in determining how income tax assessments are calculated.[11] This is perhaps as well, for the courts might find it difficult to decide which set of opinions among those held by economists were those that Parliament had in mind.

The question is, in any case, not open. "Profits," said Lord Halsbury L.C. in 1892, "must be ascertained on ordinary principles of commercial trading."[12] This dictum has met with repeated approval in the House of Lords and elsewhere.[13]

This leaves the question whether, as a matter of fact, "ordinary principles of commercial trading" were applied in this case. Evidence was given by an eminent professional accountant that, although accounting views varied as to which was the "best" method, the Base Stock method of valuation adopted by the company was "a recognised commercial accountancy basis" and "a good method of accounting." He also testified that "an accountant would give an unqualified certificate to accounts as giving a true and fair view of the profits of a company whether it employed the one method or the other so long as the company had adhered to one method consistently."[14] It was found as a fact by the Special Commissioners that the company's method of stock valuation was in accordance with sound commercial practice and this was not disputed by the Revenue or by the court. There was no suggestion of inaccuracy in the *application* of the method of valuation used. Singleton L.J.'s judgment implies clearly that it was the *method* and not the actual calculation that was "inaccurate."

The facts in the *Broadstone Mills* case seem, therefore, to place that case within the area covered by Lord Halsbury's dictum, and it must be concluded, with respect, that it was wrongly decided.[15]

[11] *Coltness Iron Co.* v. *Black* (1881) 6 App.Cas. 315; 1 T.C. 287.

[12] *Gresham Life Assurance Society* v. *Styles* [1892] A.C. 309, 316; 3 T.C. 185, 189.

[13] See, for example, *Lowry* v. *Consolidated African Selection Trust, Ltd.* [1940] A.C. 648; 23 T.C. 259, where the company was held to be debarred from treating as a deduction in the calculation of profit the difference between the market value of its own shares which it had issued to employees and the (lower) price of issue. Lord Maugham, in delivering judgment, said: "It is well settled that profits and gains must be ascertained on ordinary commercial principles, and this fact must not be forgotten" (p. 661) and again "in its essence I think it is only necessary in this case to ascertain the profits and gains on ordinary commercial principles" (p. 662). It is significant that Lord Romer in his dissenting judgment argued that on commercial principles the deduction claimed by the company should be allowed (pp. 691–695).

For a recent case on the valuation of stock in trade in which this principle was applied see *I. R. C.* v. *Cock Russell and Co., Ltd.* [1949] 2 All E.R. 889; 29 T.C. 387.

[14] *Per* Singleton L.J. at p. 165.

[15] Singleton L.J., in discussing the question of "accuracy" attached some importance to the judgment of Lord Loreburn L.C. in *Sun Insurance Office* v. *Clark* [1912] A.C. 443; 6 T.C. 59, which seemed to imply that there is some absolute standard of profit calculation and that the test of "correctness" in profit calculation for tax purposes is the degree of accuracy achieved in

This seems to dispose of the matter. The case raises some interesting points of principle, however.

IV

The difficulty of the argument from "accuracy" is that until a standard of profit has been laid down, "accuracy" can have no significance. The court in this case had, no doubt, some kind of standard in mind. In view of Singleton L.J.'s references to the importance of valuing stocks at the beginning and end of the year, "profit" was presumably correlated with changes in the value of some of the company's property. But, on this basis, the type of valuation approved by the court would often fail to pass the court's own test. Nearly all forms of the cost or lower market method fail to take into account unrealised appreciation in stocks held at the end of the accounting period, and are hence "inaccurate." Nor is it an answer to this criticism that "commercial principles" do not recognise the inclusion of unrealised appreciation in the profit calculation, for it is of the essence of the judgment in this case that these principles may be ruled out if they lack "accuracy."

It is true that it has long been the more usual practice of accountants when computing business profit to make some kind of adjustment for changing stock values of the type evidently envisaged by the Revenue and the court in their use of the term "cost or lower market value." The adjustment is, indeed, analogous with the similar adjustment that is made for changes in the amount of outstanding trade debtors, it being customary to assume that revenue includes amounts receivable as well as amounts received, and that, therefore, where there is, for example, an increase in the amount of book debts, it is necessary to add this increase to the cash receipts in order to arrive at the "correct" revenue figure. As in the case of stock, to the extent that this is not done the balance-sheet fails to take account of a "hidden reserve," in this case of debts not included. It has not, however, up to now, been thought that adjustments in this respect are in every case an essential element in computing taxable profit. They are certainly usual, but this is not because the income tax legislation requires such treatment, but because it is the common commercial practice. It has long been the custom in some professional practices to ignore, not only changes in stock and professional "work in progress," if any, but also changes in book debts, it being assumed that cash fees received are an adequate measure in any given year of the gross revenue of that year,

approaching this standard. It may be doubted, however, whether in view of the earlier *Gresham Life Assurance* case this was an essential element of the judgment. To the extent that it was, the reasoning, though not the judgment, in the *Sun Insurance* case is open to the same criticism as that in the *Broadstone Mills* case.

provided always that the same basis is followed from year to year. It cannot be argued that, in this respect, professional practices are on a different basis from trading businesses. In both cases the Act requires tax to be charged on the "full amount" of the profits. (I.T.A. 1952, s. 127.) It is of interest to note that the *Broadstone Mills* decision would, if upheld, seem to provide good authority for charging to tax, on the grounds of "accuracy," the outstanding uncollected fees of any of Her Majesty's counsel at the time of their elevation to the bench or retirement.

Nor is this all. The distinction between the Base Stock method of valuation and the more usual type of calculation can be expressed broadly as the distinction between (a) a concept of profit based on surplus remaining after providing for the maintenance of business at the same *level of activity* or on *the same scale* (here represented by the fixed minimum physical level of stock), which an economist would describe in terms of the preservation of the value of the stock in *real* terms; and (b) a concept of profit based on the surplus remaining after preservation of the *value of the business* (or, in this case, the *stock*) *in terms of money*. If accuracy is to be the test, some accountants would be prepared to give evidence that the Base Stock method is *more accurate* than any cost or lower market value basis, since, as indicated above, its use produces a figure of profit approximating more closely to a profit calculated in terms of purchasing power, as distinct from money.

This suggests that there is something fundamentally unsound in the implicit assumption of the court that there exists a "standard" or "true" profit in the sense of some unique figure which can be found in any given case, and to which a more or less accurate approximation can be made. Even had there been no precedent requiring the application of commercial principles to profit calculation, the decision in the *Broadstone Mills* case would have been unsatisfactory.

The ideas conjured up in the mind by such words as "profit" and "income" do not relate to "things" of the "real world" of the kind which we assume exist because our senses tell us of them. They refer to the result of a class of operations or procedures carried out by men for particular purposes. The precise details of the operation in any given case are governed by the aims of the people concerned. In the case of business accounts the aim is to arrive at an agreed or approved assessment of changes in certain types of interests in property during a given period. This is necessary in order to determine such questions as the amounts that are to be withdrawn by partners from a business at the end of a given period, or the relevant rights of different classes of shareholders; and to satisfy such rules of law related to interests in property as the law relating to the divisible profits of companies, which, in theory at least, protects the property rights of creditors as against those of shareholders. The rules of calculation are necessarily in some

degree arbitrary because, although behind the relevant contracts or rules of law lies the general idea of profit as an increase in the value of property, the value of a given property right is a thing on which two persons will seldom agree unless it is calculated on some predetermined arbitrary principle. It would, no doubt, be possible to compute profit annually on the basis of a careful valuation of the property concerned, such as is made when a business is sold or for estate duty purposes. This, however, would be impossibly costly and impracticable. Hence, for commercial purposes, rule-of-thumb practices are accepted for year-to-year calculations.[16]

Similarly, in the law of trusts, certain rules regulate, as a matter of convenience, the allocation of given property rights between life tenants and remaindermen. The application of the rules is susceptible of amendment by the settlor to suit his own views of how his property should be administered. The settlor decides what is " income " whether his decision is implied by his acceptance of the established rules of law or is explicit in the trust instrument.

In income tax law, the question " What is profit? " must be assumed to have been decided by the legislature. It might reasonably be expected that the decision would be based on a consideration of the economic effects expected to result. This assumption is of considerable importance in relation to the judicial interpretation of revenue law. If Parliament fail, as they have done in this context, to describe the procedure by which taxable profit is to be calculated, is it to be surmised that they have left it to the courts to decide what is the " correct " or most " accurate " method of calculation required to achieve their presumed economic aim? This surmise would be tantamount to a supposition that Parliament intended to delegate legislation on certain economic matters to the courts. Or is it rather to be assumed that Parliament, having laid down no procedure of calculation, intended that the word " profit " in the context we are discussing should mean the kind of figure that reasonable business men and accountants would accept; aware no doubt that a certain lack of uniformity would result, but satisfied that, taking one year with another and one business with another, both justice and the economic aims of the legislation would be satisfied? This, it must be presumed, was believed by the House of Lords in 1892.[17]

In the *Broadstone Mills* case it was a criticism of Vaisey J. in the High Court that the method of calculation adopted by the company involved the bringing into account of a " mere arbitrary " figure; a similar comment was made by Singleton L.J. in the Court of Appeal. Yet the arbitrariness so introduced (and no commercial

[16] On this see the very clear discussion by Fletcher Moulton L.J. in *Re Spanish Prospecting Co., Ltd.* [1911] 1 Ch. 92, at p. 98 *et seq.*

[17] A third possible view, that an economist's definition is implied, has already been mentioned.

profit calculation is without its arbitrary elements) is small compared with the arbitrariness which will be introduced into the revenue law if, as has happened in this case, the court is to appropriate to itself the right of prescribing accounting rules. Thereby a large additional uncertainty will be added to the problems of business men, for who will be able to tell whether an accounting rule of profit calculation accepted for fifty years will not be challenged in the courts, when, owing to the particular conjucture of prices and other circumstances, it happens to suit the Revenue to do so?

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SALE OF MOTOR-VEHICLE BY HIRE-PURCHASER

A Legislative Proposal

There has for too long been very real hardship caused to many persons of moderate means where motor-cars on hire-purchase change hands several times before the hire-purchase company takes any action. Judges have commented on this hardship with increasing frequency.

The hirer, A, not infrequently sells to B before all the hire-purchase instalments have been paid, and B may resell to C and C to D and D to E. The hire-purchase company then finds out what has happened and sues E to recover possession of the car and E joins D as a third party claiming under the implied warranty of title, and D similarly joins C as a fourth party and C joins B as a fifth party and B joins A as a sixth party. By that time A is usually impecunious, and some innocent person, usually B or C, has to pay the damages, and his own costs, and the plaintiff's costs, and the costs of all purchasers subsequent to him. This causes grave hardship, and sometimes ruin, to innocent people and it has long been obvious that the real trouble is that the motor-car registration book, though not a document of title, is so regarded by the public who have no other way of ascertaining who is the owner of the car.

It is desirable to emphasise two points:

First, the persons involved in these transactions are not well-to-do persons who buy motor-vehicles from the ordinary motor-car dealers. These dealers know, what the ordinary member of the public does not, that most hire-purchase agreements are registered with a company called H.P. Information Limited, which is a trade organisation formed for that purpose and through whose offices the dealers protect themselves. The persons involved in the transactions in question are the less well-to-do motorists who buy cars which they hear from their friends are available for sale by their owners.

Secondly, while the hirer is very occasionally an habitual criminal, in the large majority of cases he is not. The House of Lords has long since decided that in law a hire-purchase agreement is an agreement of hire with an option to purchase. To the ordinary small man, however, it is a purchase on credit terms, which is, indeed, from a common-sense point of view, its real nature. To the ordinary man, therefore, it does not seem dishonest to sell a car, nine-tenths of which he has already paid for and the balance of the purchase price of which he intends to pay after the sale.

Scott L.J. suggested that the situation could be met by providing for disclosure in the registration book that a hire-purchase agreement attached to the car.[1] The Government, however, rejected the proposal on the ground of administrative difficulty, no indication being given of the precise nature of the difficulty.[2] Hilbery J. later made the alternative suggestion that cars subject to hire-purchase agreements should carry a distinctive mark[3]; but this is inferior to the earlier suggestion because the mark would have to be of a removable character and could therefore be removed before sale. Yet another suggestion is that there should be a State register of hire-purchase agreements in respect of automobiles on the lines of the private register referred to above.[4]

Of these possible solutions, the most promising is that connected with the registration book. It may be that the Government's objection was based upon the undesirability of requiring local authorities who are concerned with taxation of vehicles to investigate questions of title. However, this hardly seems a substantial objection, because the onus could be thrown upon the hire-purchaser and the hire-purchase company rather than upon the local authority. What is required is, principally, an amendment to the Sale of Goods Act providing that a hire-purchaser can pass a good title to a motor-vehicle if notice of the hire-purchase agreement is not given on the registration book. The practical details of the scheme are as follows :

(i) In section 25 of the Sale of Goods Act, 1893, after subsection (3) there should be inserted the following subsection: —

> " (4) Hirer in possession.—Where a person who has agreed to hire a mechanically-propelled vehicle under a hire-purchase agreement is in possession of the vehicle with the consent of the owner, a purchase from that person in good faith and without notice of the fact that the seller is not the owner shall convey a good title unless the hire-purchase agreement is registered in accordance with the provisions of the Road Vehicles (Registration and Licensing) Regulations for the time being in force."

(ii) The " prescribed form " referred to in Regulation 2 of the Road Vehicles (Registration and Licensing) Regulations, 1951, should include a space for the applicant to state whether or not the car is on hire to him under a hire-purchase agreement, and, if so, the name and address of the hire-purchase company.

(iii) The Minister should direct under Regulation 6 that among the particulars to be included in the registration book should be the name and address, if any, so furnished by the applicant.

(iv) The Minister should make a further Regulation providing for deletion of the entry in the registration book on payment of an

[1] *Norman* v. *Pitt* [1948] W.N. 270, C.A.
[2] 451 H.C.Deb., col. 1611; *cf.* 4 J.Cr.L. 242–3; 113 J.P.Jo. 263.
[3] *The Times*, July 19, 1950.
[4] (1950) 100 L.J.Newsp. 436.

appropriate fee, and on application on a prescribed form purporting to be signed both by the original applicant and by the hire-purchase company named on the original form of application.

It is suggested that in order to avoid reprinting the existing stock of registration books, rubber stamps should be made and the books stamped, preferably in red, in large letters in part of the space on page 6.

This car is on hire-purchase from

(*Name*) .....

(*Address*) .....

If these suggestions are adopted—

(i) No hire-purchase company would be under any legal obligation to see that the hire-purchase agreement was registered, but the hire-purchase company would be liable to lose the property in the car if they did not take steps to see that the hirer had registered the agreement. What would happen in practice would be that the hire-purchase company would not release the car until the hirer had produced to them the registration book with the hire-purchase entry on it.

(ii) The motor taxation authority would be under no obligation to make any investigation as to whether or not the particulars registered were correct, or to do other than make an additional entry of a name and address on the log book in cases where a motor-car was registered as being on hire-purchase.

(iii) The additional administrative work would be small. The real administrative difficulty of motor taxation authorities is that nearly all their work arrives in a rush near the four quarter days. The registration in question, which would take place on the purchase of the car, might ordinarily be expected to be evenly spread throughout the year.

The measure could not in this form extend to Northern Ireland because the Road Traffic Act, 1930, does not extend to Northern Ireland and because, although the Sale of Goods Act, 1893, extends to Northern Ireland, the Road Vehicles (Registration and Licensing) Regulations do not. Somewhat similar Regulations are, however, made by the Government of Northern Ireland. If, therefore, that Government wished the Bill to extend to Northern Ireland, the Bill could so provide.

Q. C.

REPORTS OF COMMITTEES

Report of the Committee on the Taxation Treatment of Provisions for Retirement (Cmd. 9063)

It might be said without undue exaggeration that the Report of the Millard Tucker Committee is the most significant social document published in this country since the Beveridge Report. But whether it reveals an equally desirable tendency towards social democracy is perhaps more dubious.

As Professor Titmuss recently pointed out in *The Times*,[1] the growing popularity of superannuation schemes in commerce and industry, and the taxation advantages attaching to them, are rapidly dividing the working population of this country into two classes—those who are dependent for retirement on the National Insurance Scheme and those who enjoy the infinitely greater benefits obtained through their employers' retirement schemes. As yet, however, the latter class is far from homogeneous since the various types of scheme differ greatly amongst themselves both in the benefits thereby secured and in their treatment for taxation purposes. If the recommendations of the Committee are implemented a considerable measure of uniformity will be introduced in both these respects. This alone would aggravate, rather than minimise, the rift between the two classes. To some extent, however, this tendency would be counteracted as a result of the further recommendations whereby those not participating in pension schemes (*e.g.*, the self-employed, controlling and part-time directors, and those employed in posts not covered by any employer's scheme) would be afforded comparable taxation relief in so far as they provided out of their own savings for similar benefits.

To this extent the recommendations seem eminently desirable. In particular they will gladden the hearts of the self-employed professional classes, such as the legal profession—and especially the barristers' branch of it which at present finds it virtually impossible to make adequate arrangements for retirement. Equally, there is much to be said for the basic taxation principle advocated by the Committee. Briefly, this principle is that contributions to schemes approved by the Revenue shall be allowable as expenses and that benefits ultimately received shall be taxed. Further the conditions for Revenue approval suggested by the Committee should eradicate the worst features of some of the present " top hat " schemes. But when this has been said, the proposals are subject to formidable objections which seem to require the most careful consideration. The main objections may be summarised as follows :—

[1] For December 29 and 30, 1953.

1. Without interfering with vested contractual rights or legitimate expectations the suggested standardisation cannot be made to apply to the existing beneficiaries of schemes in operation. Hence the Committee are constrained to recommend transitional provisions which will introduce the gravest administrative complications.

2. The proposals necessarily benefit only those who are liable to pay income tax. The poorer classes, who have no surplus income either to save or to be taxed, will remain dependent on National Insurance and the discrepancy between their pensions and those of the other part of the retired population will be increased rather than diminished.

3. It may be expected that the recommendations, if carried out, will lead to a further increase in the number of employers' schemes. These necessarily have the undesirable feature of restricting the mobility of labour. An employee with "accrued" pension rights which he cannot take with him is tied to his existing employer by the strongest of economic bonds. This, surely, is the road to serfdom? Group or federated schemes may minimise this objection, but only a State scheme seems capable of eradicating it.[2]

4. The Committee recommend an exception to the general principle, that benefits shall be taxable, whereby up to one-quarter (or £10,000) can be taken out in the form of tax-free capital payments. This, it is submitted, will inevitably lead to an enormous extension of one undesirable feature of the present "top hat" and similar schemes. The Committee themselves express misgivings about this exception and justify it only as the recognition of a *fait accompli*.[3] If it is extended it will inevitably result in growing sections of the population receiving not unsubstantial capital payments. Moreover they will receive them not when it is socially and economically most desirable (say at the age of thirty when they are bringing up their children) but at sixty-five or seventy when they are approaching their end and when they are likely to spend this capital on country cottages, television sets and consumer goods to comfort them in their declining years. Capital for the superannuated is less easy to justify, on any political theory, than capital for the enterprising.

5. While it may be true that personal savings will be encouraged, the savings will be tied up in institutional funds. This again will

[2] The question of transfer on change of employment is discussed in paras. 178–84 and Chap. 8. As the committee point out, this is primarily a matter for decision by employers when drawing up schemes but in practice they are not prepared to allow the full benefits of their contributions to be taken out. It is interesting to contrast the position under the Shop Clubs Act, 1902, s. 7 of which provides that a workman on leaving his employment shall be entitled either to remain a member of the club or to be paid the actuarial value of his share.

[3] "We have not been able to find any satisfactory explanation why this lump sum ever came to be treated as non-taxable. If we were dealing with this matter without any reference to existing practice we should have found it very difficult to recommend that any part of the benefit should be in tax-free form": para. 160.

enhance an existing, and not wholly desirable, tendency whereby the only private source of new capital is the institutional investor —not the most eager supplier of risk capital. The likely result will be to vest immense monopolistic power in a few mammoth insurance companies. This is not a development to be faced with equanimity.

6. The expense to the Exchequer is formidable (it is officially estimated at £60m–£80m a year, but unofficial estimates put it very much higher[4]). This is not only, or even mainly, due to the tax-free capital payments, but rather to the fact that the contributions deductible from taxable income fall in years of high earnings while the taxable benefits fall in years of much lower income.

Having regard to objection 6, any Chancellor of the Exchequer is bound to find difficulty in implementing the proposals. At the same time they are not unlikely to commend themselves to a Conservative Chancellor pledged to a policy of introducing a "property-owning democracy." To some (dubious) extent they are "democratic," and, having regard to objection 4, they certainly encourage "property-owning." Further they provide incentives for the over-taxed managerial class. What is more surprising, having regard to objections 2–4, is that they should have been accepted in principle by the trade union representative. Though Mr. George Woodcock, and the former Chief Inspector, Sir John J. Cater, add reservations regarding the proposals for the self-employed and the like, these reservations do not amount to a general dissent; indeed, to their alternative proposal for an extended life-assurance relief, objection 4 applies even more strongly since whole-life and endowment assurance produce wholly tax-free capital payments at death or dotage.[5] If, however, an increased relief were limited to deferred annuity policies this solution would have much to commend it on all grounds and would certainly reduce administrative complexities.

Nevertheless the Report tackles a serious social problem which can no longer be burked, and it may point the way to the only practical solution of it under present conditions. Some, at least, of the objections could be eradicated or minimised if less sacrosanctity was attached to existing practice and present expectations. It is highly doubtful whether anyone has been so naive as to plan his retirement on the basis that there will be no changes in the tax law, and that being so there seems no overwhelming objection to a compulsory change in existing pension schemes if they are to retain Revenue approval (objection 1) or to the elimination of tax-free benefits (objection 4). But it is difficult to see how the other objections, of which 2 and 3 seem the most serious, can be met except by removing the whole subject from the realm of private

[4] And these estimates relate merely to the *extra* cost. No estimate is given of the present cost to the Revenue of existing schemes, but it is clearly formidable.

[5] And, as may capital payments under approved schemes, they may largely escape the death duty net thus reversing the present tendency towards the diminution of inherited wealth.

enterprise. By taxation concessions, the State indirectly helps to finance " private " schemes as well as public ones. The question of basic policy is whether it is desirable to leave in operation two State-subsidised schemes, under one of which the benefits are (at present) below subsistence level, whereas in the other they may be well above it.

L. C. B. G.

THE ENGLISH CONCEPT OF DOMICILE

THE judiciary and the administration alike may justly take comfort from the First Report of the Private International Law Committee,[1] which gives unanimous approval of current judicial practice in a highly controversial branch of the law, leavened with only a few minor suggestions for amendment. True, there is an appearance of daring in Appendix A, consisting of a draft code on the law of domicile, but while this garnish bears much of the promise, it contains little of the substance of change.

The Committee and its Terms of Reference

The committee was appointed to consider changes in such rules of Private International Law as the Lord Chancellor might from time to time refer to it, and on the request of the Lord Chancellor, the subjects to be proposed for discussion at any international conferences on private international law; to make recommendations for instructions to be given to the United Kingdom representatives at such conferences, and when requested to consider and make recommendations on the reports of such conferences and the action to be taken on them. The committee is therefore dependent upon the Lord Chancellor of the day; it is to consider questions designated by him and no others.

The first question submitted to the Committee by the Lord Chancellor was " What amendments are desirable in the law relating to domicile, in view especially of the decisions in *Winans* v. *Attorney-General* [2] and *Ramsay* v. *Liverpool Royal Infirmary*,[3] and whether, in the light of any alterations which the committee may recommend in that law, it appears desirable that Her Majesty's Government should become a party to the draft Convention to regulate conflicts between the law of the nationality and the law of the domicile." [4]

The General Approach

The general approach of the committee is perhaps epitomised in the following two general comments:

[1] Cmd. 9068, H.M.S.O., 6d. net.
[2] [1904] A.C. 287.
[3] [1930] A.C. 588.
[4] This was one of the Conventions approved by the Conference on Private International Law held at The Hague in October, 1951, under the auspices of the Dutch Government.

(1) (of the Wills Act, 1861 [5]): "Although this Act is not altogether satisfactory, we would not suggest any amendment to it, even if it were within our terms of reference to do so." [6] This gratuitous comment upon one of the most ill-considered and badly drafted of statutes, which introduced into the conflict of laws the unsuitable concepts of nationality (instead of domicile) and personalty (instead of movables) should suffice to allay any suspicion of radical reforming tendencies.

(2) (of the foreign court or total *renvoi* theory) : "This theory no doubt has the advantage that it succeeds in achieving harmony of decision between the English and the foreign courts." [7] In view of the highly unsatisfactory method of proof of foreign law in the English courts, and the presumption that in the absence of evidence to the contrary, foreign law is the same as English, this statement would be difficult to substantiate. Is it, for example, borne out by the decision in *Re Wellington, decd.*,[8] decided by the chairman of the committee?

The Detailed Proposals

The Domicile of Choice. The committee recommends no change in the requirement that, to acquire a fresh domicile of choice, a person of full capacity must intend to reside in a country permanently.[9] Here is the only mention of a rift in the committee, since we are told [10] that a minority considered that the intention need be only to reside for an unlimited time. But some transfer of the burden of proof might result from the proposed rules [11] that a person shall be presumed to intend to live permanently where he has his home, or his principal home if more than one, or where his wife and children have their home if he is stationed in a country for the principal purpose of carrying on a business, profession or occupation. The committee is probably right in thinking that the application of these presumptions would have reversed the decision in *Ramsay's* case, but this result is not quite so clear in *Winans'* case. The third presumption might also produce some strange results if not carefully handled, *e.g.*, in such cases as *Donaldson* v. *Donaldson.*[12] The committee apparently considers that the changes so effected would be sufficient to make this country an acceptable adherent to the International Convention. One can only hope that this minimum change would, in fact, suffice.

[5] Lord Kingsdown's Act (24 & 25 Vict. c. 114).
[6] p. 4, para. 5, cl. 2, last sentence.
[7] p. 11, para. 23 (3), line 5.
[8] [1947] Ch. 506.
[9] Draft Code. Art. 2 (1).
[10] p. 5, para. 7, cl. 3.
[11] Draft Code. Art. 2 (2).
[12] [1949] P. 363.

The Domicile of Origin. The committee recommends :

(1) that it should in future be no harder to displace a domicile of origin by a domicile of choice than it is to displace one domicile of choice by another, and

(2) that the doctrine of the revival of a domicile of origin established in *Udny* v. *Udny* [13] should be abolished.

These are two highly desirable amendments, but even here the committee has failed to follow the logic of its own recommendations, because once these peculiar and undesirable characteristics of the domicile of origin are abolished, the *raison d'être* of the domicile of origin as a separate concept has disappeared. Indeed, Art. 1 (2) of the proposed code, which reads: " A domicile is either a domicile of origin or a domicile of choice " is most unsatisfactory. Not only has the committee here perpetuated the distinction between the domicile of origin and the domicile of choice, but it has completely failed to mention the domicile which, on its own recommendations, can alone be acquired by infants and married women, *i.e.*, the domicile of dependence.

The Domicile of Married Women. The doctrine that a married woman, by operation of English law, acquires any domicile which her husband may choose to acquire quite irrespective of the motives, however fraudulent as regards the wife, for which he chooses that domicile, or whether the wife has any knowledge of the domicile so acquired, or of whether the husband contributes one penny towards the wife's support, was adumbrated by the courts in the latter part of the nineteenth century. It was, however, finally established in its full rigour by a decision of the House of Lords in 1921 [14] and by one of the Privy Council in 1926,[15] which were reached not only in disregard but in the very teeth of the Married Women's Property legislation of 1882–1907 and the Sex Disqualification (Removal) Act, 1919. The social consequences of the doctrine established by the House of Lords and the Privy Council were so deplorable as regards deserted wives that the legislature was forced to intervene in 1937 and again in 1949. It did not, as it might (and many will think, should) have done, overrule the outmoded notion of the unity of domicile, but it circumvented it for the purposes of divorce jurisdiction, by providing that the English courts will take such jurisdiction when the wife has been deserted while domiciled in England and the husband has subsequently acquired another domicile, and also when she has been ordinarily resident in England for three years before presenting her petition. A decision of the Court of Appeal last year [16] has

[13] (1869) L.R. 1 Sc.Ap. 441.
[14] *Lord Advocate* v. *Jaffrey* [1921] 1 A.C. 146.
[15] *Att.-Gen. for Alberta* v. *Cook* [1926] A.C. 444.
[16] *Travers* v. *Holley* [1953] P. 246.

established that the English courts are also prepared to grant similar jurisdiction to foreign courts.

The committee's only proposal in this branch of the law is that a woman who has been separated from her husband by the order of a court of competent jurisdiction [17] should be able to acquire a separate domicile, but subject to this one proviso the committee recommends [18] that Parliament should give legislative force to the rule that every woman must by operation of law acquire her husband's domicile. This legal unity, of course, assumes its maximum practical importance when the real unity of the family has disappeared, *i.e.*, when husband and wife no longer live together.

Various other possibilities are considered, but the committee does not think that the experience of the United States has been such as to encourage it to recommend the adoption in this country of the rule that a married woman should be able to acquire a separate domicile in exactly the same way as an unmarried woman. No reasons whatsoever are given for this sweeping judgment. We have no indication of the evidence taken into account in arriving at this conclusion or of the sources of such evidence. Nor does the committee regard the fact that in most European countries a married woman can acquire a separate domicile as being of much relevance in view of the smaller importance attaching to domicile in these countries.

The committee considers the main difficulties of deserted wives to arise from the rules governing jurisdiction in matrimonial causes, which it thinks are primarily a matter for the Royal Commission on Marriage and Divorce. In this the committee seems out of date. The difficulties about jurisdiction in divorce and matrimonial causes have been largely overcome by the legislature.

To one less versed in the proceedings in the Chancery Division than most of the members of this committee the contention that the fact of desertion (or presumably any other matrimonial offence) should not affect such matters as the validity of a married woman's will or the distribution of her property on intestacy seems quite incomprehensible. Does not the present position leave the door wide open for the deserting husband to overturn the will of his deceased wife by proving that she was not domiciled where she thought she was? Are there no similar pickings to be had on intestacy? The difficulties foreseen about proof of separate domicile could be avoided by registration, and the argument of possible tax evasion seems irrelevant. In the sphere of taxation the unity of husband and wife is more rigorously enforced in the interests of the Exchequer than in any other branch of law, but this is no argument in favour of the unity of domicile. Two tyrannies are no nearer

[17] This includes not only a separation decree, but also a separation order in a magistrates' court, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949.

[18] Draft code, Art. 3.

liberty than one. It is to be hoped that the legislature will jealously scrutinise Article 3 of the committee's proposed code and many will hope that it will never receive statutory force.

The Domicile of Infants. The committee makes the sensible suggestion that the domicile of a married infant should no longer depend upon his parent. As to an infant's dependent domicile, however, it recommends that the infant's domicile should normally follow that of the person in whose custody he is, but should change with a change in that person's domicile only if there is positive evidence that such was the intention. While dealing with this question it seems unfortunate that the committee did not also recommend that the change could be made only if for the infant's benefit, and would in any event be vitiated by fraudulent intention on the part of the person effecting the change.

This whole question is also bedevilled by the married woman's dependent domicile, which by making a woman incapable of affecting her own domicile once married, renders her equally incapable of deciding freely the domicile of children dependent upon her.

The Domicile of Lunatics. The proposal that there should be power to change the domicile of a lunatic when this is in the lunatic's interest, subject to the approval of a court of competent jurisdiction,[19] will be welcomed.

The Draft Convention to regulate conflicts between the law of nationality and the law of the domicile. The provisions of this convention are directed towards the avoidance of the doctrine of *renvoi* by provisions that the internal law of the domicile shall be applied. This seems a highly desirable solution, and it is only regrettable that where the conflict is between the law of the domicile and the law of the *situs*, the committee should consider that the doctrine of total *renvoi*, as in *Re Wellington*, should still be applied.

O. M. Stone.

[19] Draft Code, Pt. 5.

NOTES OF CASES

Taking Property Without Compensation—Severability of Statutes—Value as Precedent of Court of Appeal Decision Given Without Jurisdiction.

Ulster Transport Authority v. *James Brown & Sons, Ltd.* [1953] N.I. 79 involved many questions, of which the following three are of considerable interest.

1. *Taking property without compensation.* By section 5 (1) of the Government of Ireland Act, 1920, the Northern Ireland Parliament may not take property without compensation.[1] In this case, the legislative provision impeached as infringing that restriction was section 18 (1) of the Transport Act (Northern Ireland), 1948, which imposed limitations on private enterprise road haulage.[2] The defendant company have carried on since 1898 a furniture removal business of both the kind permitted under section 19 (1) of the Act of 1948 and that prohibited by section 18 (1). They were prosecuted in respect of an occasion in 1951 when they acted contrary to section 18 (1). After conviction by the magistrate, they appealed to the Divisional Court (Sheil and Curran JJ.), where section 18 (1) was held *ultra vires*. This decision was unanimously affirmed by the Court of Appeal[3] (Lord MacDermott L.C.J. and Porter and

[1] The relevant provisions of the Act of 1920 are:— s. 4 (1) Subject to the provisions of this Act, the Parliament of Northern Ireland shall have power to make laws for the peace, order, and good government of Northern Ireland. S. 5 (1) In the exercise of their power to make laws under this Act the Parliament of Northern Ireland shall not make a law so as either directly or indirectly to . . . take any property without compensation. Any law made in contravention of the restrictions imposed by this subsection shall, so far as it contravenes those restrictions, be void.

The words represented by the three little dots are a lengthy protection of religious freedom, equality and property. It may be that the House of Lords will one day decide that "take any property" refers to religious property only. But the contrary was decided by the N.I. Court of Appeal in *O'Neill* v. *Northern Ireland Road Transport Board* [1938] N.I. 104, and in the case now under discussion. For the purposes of this note, the judicial interpretation is accepted, and accordingly the material text of s. 5 (1) is as given in this footnote. For juristic comment, see articles by Professors J. A. Coutts and F. H. Newark in the *Northern Ireland Legal Quarterly*, Vol. 3, pp. 47, 77 and 138, and Vol. 4, p. 168.

[2] The relevant provisions of the Act of 1948 are:— s. 18 (1) Save as provided by the next succeeding section of this Act, a person other than the Authority shall not . . . use a motor vehicle on a public highway to carry for reward any passengers or any luggage or merchandise. S. 19 (1) The provisions of the last preceding section shall not apply to or affect . . . (d) the use, by a person who carries on . . . the business of a remover or storer of furniture, of a motor vehicle to move furniture or effects, not being part of the stock in trade of the owner thereof, from or to premises occupied by such owner to or from other premises occupied by such owner or to or from a store. . . .

[3] An appeal lies to the Court of Appeal in these circumstances under s. 50 of the Act of 1920.

Black L.JJ.). It was admitted or proved that if the defendants did not do the work, the U.T.A. would have to be employed. Furthermore, if prohibited from doing this work, the defendants would from that cause alone lose important and substantial business connections and work arising from them and goodwill, and their permitted furniture removal business would be seriously and adversely affected. The U.T.A. do all kinds of furniture removal work, and hope to acquire a monopoly of it. No compensation had been paid to the defendants in respect of the prohibition, nor was any provided for in the Act.

Sheil J. approached the problem by saying, first, that goodwill is *property*, as it can be dealt with independently of anything tangible. Secondly, there had been a *taking* of goodwill, as the prohibited business would accrue to the U.T.A. Thirdly, it would be different if there had been a mere prohibition. The learned judge's second and third points suggest that some sort of transfer is necessary for a taking of property; yet this is difficult to reconcile with goodwill being the property taken. The U.T.A. do not get the goodwill attaching to the defendants' business: they get a competition-free opportunity to develop their own business. People wanting goods carried will employ the U.T.A., not because they used to employ the defendants, but because the U.T.A. are the sole operators.

Curran J. also considered " take " and " property " separately. He thought that nothing was transferred from the defendants to the U.T.A., " other than the custom of those who own furniture and want it removed and carried. The custom of those who, but for the statutory prohibition, might have become clients of the [defendants] cannot, in my opinion, be described as property " (p. 98). But, he said, there could be taking without transfer. " In my opinion, what has been taken from the [defendants] is a right which they undoubtedly had, namely, their right to carry on that part of their business as furniture removers and storers . . . ,"[4] and he cited authorities from the U.S.A.[5] (pp. 98–9). This is clear, but Curran J., as he was entitled to do, refused to explore the difficulties. If taking property does not necessarily involve any notion of transfer, is a prohibition extending to everyone void? Cannot a now lawful trade, which in time comes to be generally regarded as noxious, be entirely prohibited without compensating

[4] Sheil J. said he agreed with Curran J. " that a right to exercise a lawful trade is property and that the effect of the impugned section has been to take such property without compensation " (p. 93). Is such property taken by making the trade unlawful? Or does Sheil J. still require a transfer?

[5] The American cases cited, regrettably, did not include *Daniel* v. *Family Security Life Ins. Co.* (1948) 336 U.S. 220, where the Supreme Court unanimously held valid a South Carolina statute prohibiting life insurance companies from owning or operating undertaking businesses, and prohibiting undertakers from serving as agents for life insurance companies.

everyone engaged in it on the appointed day?[6] Curran J.'s opinion opens up possibilities of narrowing the legislative powers of the N.I. Parliament almost to vanishing point.[7] It is true that the opinion does not compel this, but it remains to work out the point at which it can be distinguished.

In the Court of Appeal, Lord MacDermott L.C.J., with whose opinion Porter and Black L.JJ., in shorter judgments, concurred, said that the defendants had "lost" property. They "will, over and above such consequential damage as may be inflicted on that part of their undertaking which they remain free to carry on, lose completely—(i) the portion of their furniture removal business struck at by these provisions, and (ii) the goodwill which exists in respect of that portion. . . . I do not think any significant distinction is to be drawn between the two elements I have enumerated. . . . here the relevant loss is really a loss of goodwill in the commercial sense . . ." (pp. 109–10). He held that there was a taking of this goodwill without compensation—a taking over by the U.T.A.[8]; he said it might be different with a "mere" prohibition, but that it was not necessary to decide. It was not necessary to decide, but the question is very important. It is submitted that, in the light of this case, "directly or indirectly to take any property" includes (i) to vest, or order the vesting, in any person of anything marketable previously belonging to any other person; (ii) to create a monopoly in place of competitive undertakings; and (iii) to destroy, or order the destruction of, anything marketable, otherwise than by prohibiting everyone from engaging in a particular activity; but (iv) nothing else. This case is authority only for head (ii); head (i) is obvious; both head (iii) and the limitation on it are controversial, and so is (iv). The underlying principle suggested is that "to take any property without compensation" involves impoverishing one in relation to others. There is nothing in the statute which compels this interpretation, but it is put forward as a reasonable compromise between the widest possible construction of section 5 (1) and the greatest possible powers of the N.I. Parliament. Each citizen ought to be entitled to equal treatment with other citizens, while the legislature ought to be able to ordain new criminal offences in the interests of public policy: it ought to be able to see

[6] In *Clarke* v. *Haberle Crystal Springs Brewing Co.* (1929) 280 U.S. 384, Holmes J., giving the unanimous judgment of the Supreme Court, said: "It seems to us plain . . . that when a business is extinguished as noxious under the Constitution the owners cannot demand compensation from the government. . . ."

[7] These are the possibilities which failed to commend themselves to the Judicial Committee of the Privy Council in *Re A Reference under the Government of Ireland Act*, 1920 [1936] A.C. 352.

[8] But the U.T.A. do not get what the defendants had. In Hohfeldian terminology, the defendants had a privilege or liberty—of carrying on a business. S. 18 (1) of the 1948 Act did not give that to the U.T.A.: they had that independently of s. 18 (1). What that section gave them was a claim—to prevent competition.

to the policing of the Province. One cannot be impoverished in the abstract: poverty is a social accomplishment. A universal prohibition [9] does not alter the relative ranges of different people's activities or assets. So it is contended that an enactment that Mr. Smith's grocery shall shut at 5 p.m., while all other grocers remain free to trade until later, would be to take property; but a provision that all shops shall shut at 5 p.m. would be valid. It is true that the analysis preferred here [10] does not give the citizen such extensive protection as that accorded in some American cases, and gives him more than in some others, but it must be remembered that the task here is not to define "take" or "property," nor even to define "directly or indirectly to take any property without compensation," but to interpret these last words for the purposes of the Government of Ireland Act, 1920. Even the narrowest meaning inevitably attached to the phrase after the *Brown* case is more extended than was previously thought correct. Whether in view of that the express limitations on the powers of the N.I. Parliament ought to be relaxed is a political question, to be decided ultimately by the assembly at Westminster.

2. *Severability of statutes.* The defendants having been acquitted, and section 18 (1) having been held void so far as it contravened the restrictions in section 5 (1) of the 1920 Act, what is the state of the Statute Book? There is not much United Kingdom experience of holding legislation void. There are authorities on delegated legislation, and there are authorities on Acts of the highest legislatures of colonies and Dominions and foreign countries with written, especially federal, constitutions. But the N.I. courts have never faced up to the problem of severance before.[11] There appear to be three main possibilities, once some voidness has been attributed to part of a statute. First, some words may be wholly inoperative (*i.e.*, *ultra vires* in all their conceivable applications), and the result of holding them void is that they are to be ignored without prejudice to the validity of the rest of the Act ("vertical severance"). Secondly, some words may be susceptible of *intra vires* and *ultra vires* applications, and the result of so holding is (a) the same as in the first case, or (b) that they are to be ignored as to their *ultra vires* applications without prejudice to their validity in applying to other situations ("horizontal severance"). Finally, a holding that any words are susceptible of any *ultra vires* application may mean that the whole statute is to be ignored.

The first possibility was not in point in the *Brown* case, for the words in section 18 (1) are susceptible of some applications which may not infringe section 5 (1) of the 1920 Act, *viz.*, to persons using motor vehicles for a prohibited purpose for the first time after the

[9] The expression "negative prohibition," which appears in several of the cases, seems both inelegant and uncommunicative.

[10] *Cf.* Professor Newark's article in 4 N.I.L.Q. 168.

[11] For a previous consideration of this question, see Professor F. H. Newark's article in 9 N.I.L.Q. 19.

Act of 1948 came into force. The third possibility was quickly ruled out. Lord MacDermott, referring to section 5 (1), said: "I am not aware of any authority for the view that language such as this necessarily means that contravention must produce an actual gap in the statute book in the sense that the measure concerned, or some specific part thereof, simply drops out of the authorised text. As well as this vertical severability, if I may so describe it, I see no reason why, if the circumstances warrant such a course, the terms of section 5 (1) should not be sufficiently met by what I may call a horizontal severance, a severance that is which, without excising any of the text, removes from its ambit some particular subject-matter, activity or application. This, I think, would give effect to the words 'so far as it contravenes' without impinging on the meaning or weight to be attached to the word 'void'" (p. 118).

This solution seems very satisfactory, but it may be thought that it is not authoritative. It was material in deciding how the order of the court should be framed, but it might be said that only if in a later case the court applies s. 18 (1) is the authority for this type of severance complete. At all events, it is left open to debate as to when the circumstances warrant severance in this fashion. Perhaps it is always to happen when words have *ultra vires* and *intra vires* applications.

3. *Precedent and jurisdiction.* For the purposes of this note it is assumed that decisions of the N.I. Court of Appeal are binding on itself and on lower courts along lines similar to those laid down for England in *Young* v. *Bristol Aeroplane Co.* [1944] K.B. 718. If that is so, there was an obstacle to all the judges in reaching their decision in the *Brown* case: the earlier N.I. Court of Appeal decision in *Northern Ireland Road Transport Board* v. *Benson* [1940] N.I. 133.

The progress of the *Benson* case was, to say the least of it, peculiar. Benson was prosecuted for a breach of section 15 (1) of the Road and Railway Transport Act (Northern Ireland), 1935, which, for present purposes, was *in pari materia* with section 18 (1) of the Act of 1948. Before the magistrate he was acquitted but ordered to pay costs. The prosecutors appealed to quarter sessions, where the appeal was dismissed. The deputy recorder stated a case on which an appeal was heard by the Court of Appeal. In that court the appeal was fought on the merits of the prosecution, and the Court of Appeal eventually held section 15 (1) valid and ordered the appellant to be convicted. In the House of Lords (*Benson* v. *Northern Ireland Road Transport Board* [1942] A.C. 520) the appeal was again opened on the merits, but the House exposed the trail of misconceived proceedings, pointed out that there is no appeal to quarter sessions from an acquittal at petty sessions and that therefore the Court of Appeal decision was given without jurisdiction, and allowed the appeal on that ground without considering any other.

In the *Brown* case, all the judges in the Divisional Court and Court of Appeal held that the Court of Appeal's legal propositions in the *Benson* case were not binding on them because the case was heard without jurisdiction. This conclusion may seem somewhat surprising. The *Benson* case was not in this respect *per incuriam*, for the Court of Appeal overlooked no authority relating to the validity of section 15 (1). Granted that judges cannot make precedents whenever the spirit moves them, it does not follow that a case decided without jurisdiction is necessarily not binding. There seems, in the first place, to be a confusion between *res judicata* and judicial precedent. If a decision is quashed as having been given without jurisdiction, the parties are no longer bound by it, but that is quite consistent with later courts being bound by the *ratio decidendi* of the case. As an analogy, *Re MacManaway* [1951] A.C. 161 remains an authoritative interpretation of the House of Commons (Clergy Disqualification) Act, 1801, notwithstanding the Reverend J. G. MacManaway's Indemnity Act, 1951. Secondly, if a decision of a court is reversed on some ground which makes it unnecessary for the appellate court to consider the grounds of the decision below, the reversal does not abrogate the authority of the decision reversed. *The Parlement Belge* (1879) 4 P.D. 129 is regarded as authority for the proposition that a treaty not ratified by statute cannot alter English law, notwithstanding that an appeal was allowed on a ground which made it unnecessary for the Court of Appeal to consider this proposition: (1880) 5 P.D. 197. If, then, the ground on which an appeal is allowed is that the court below had no jurisdiction, does that make a significant difference? The decision of the Court of Appeal in the *Benson* case was given at the request of the parties (who did not raise the question of jurisdiction and who set the machinery of the court in motion by the normal invocative steps), it was given after hearing the arguments of counsel in a due and appointed place at a due and appointed time,[12] it was given after judicial consideration, and it was given with the expectation that it would be reported and cited as a precedent. It is the merest technicality that denies it authority.

Would the *Brown* ruling have been different if, in allowing the appeal in the *Benson* case on the ground that the Court of Appeal had no jurisdiction, the House of Lords had gone on to say that in respect of the validity of section 15 (1)—had it been necessary to decide the question—they would have agreed with the majority in the Court of Appeal? Then change the question slightly: suppose the House of Lords had allowed the appeal on two grounds: (a) lack of jurisdiction, and (b) section 15 (1) was void: would the second ground of the House of Lords decision

[12] It will be noticed that the Court of Appeal would have had jurisdiction had the prosecution appealed from the magistrate by way of case stated. This is not like the case, say, of a county court adjudicating outside its financial limits.

have to be ignored because of the first? All the other Lords present in *Jacobs* v. *London County Council* [1950] A.C. 361 concurred with Lord Simonds when he said (p. 369): " . . . there is in my opinion no justification for regarding as *obiter dictum* a reason given by a judge for his decision, because he has given another reason also."

Finally, is the *Brown* ruling confined to Court of Appeal decisions reversed for lack of jurisdiction, or has another hunt been added to the indispensable researches of counsel? Must every barrister against whom an authority is cited comb through the report, record, and papers to see whether there was some flaw in the jurisdiction? It would be technicality triumphant if you could avoid precedent for lack of jurisdiction even if the decision remained effective *inter partes*!

L. A. Sheridan.

The Proper Law of a Contract and Affreightment

" A charterparty has been made in Paris in the English language between a French charterer and an Italian shipowner for the carriage of a cargo of wheat in an Italian ship from a French to an Italian port. The charterers were acting for the French Government, but this fact was unknown to the shipowners. A supplement to the charterparty and the bills of lading which have been issued to the charterers in France are in the French language and the bills of lading are in French standard form. They have been endorsed to Italian consignees. The freight is payable in Italy in Italian currency. The English court is asked to decide what law is to be applied to the contract of affreightment embodied in the charterparty."

This looks like an examination question, like a situation laboriously invented by an academic brain in order to test the capacity of a group of students for arguing a case which is much " too good to be true." Yet precisely these were the facts and this was the question which confronted the Court of Appeal in *The Assunzione* [1954] 2 W.L.R. 234. Here we have the problem of the proper law of the contract, so to speak, in a test tube because nobody contended that English law applied, the court had to decide between French and Italian law and was thus untrammelled by the natural predilection of the judge for the *lex fori* which is, in all countries, the most important single factor in the shaping of conflicts rules in practice. Moreover we have the various factors which normally influence an English court in determining the so-called " implied " or the " imputed " intention of the parties almost evenly balanced: French *locus contractus*, Italian *locus solutionis* (for both parties); language and form of the contract partly French, partly English, but nationality of the vessel (*i.e.* law of the flag) Italian; one party carrying on business in France,

the other in Italy, no arbitration clause and no express choice of law. Generations of teachers of the law are going to benefit and generations of students are going to suffer from the case.

Both Willmer J. [1953] 1 W.L.R. 929, and the Court of Appeal decided in favour of Italian law. The decision in the Court of Appeal was unanimous, but the lines of reasoning of the three Lords Justices were not identical and each differed from that of Willmer J. A decision of this kind is much a matter of nuances, of a distribution of emphasis, and no two judges are likely to agree on that. All that can be done here is to select a few important points and to try to show how the various members of the court dealt with them.

Willmer J. was inclined to agree with those writers on the subject who consider that the presumption in favour of the law of the flag does not normally apply to contracts of affreightment made prior to the commencement of the voyage and that it should be regarded as mainly applicable to contracts made by the master in virtue of his authority to bind the ship- and cargo-owners. Hodson L.J., however, did not think it was "right to treat the law of the flag in connection with contracts of affreightment as if it were obsolete." He took the view that nothing had happened since *Lloyd* v. *Guibert* (1865) L.R. 1 Q.B. 115, to weaken the presumption in favour of the law of the flag, and he emphasised that the actual decision in that case "was given on a contract of affreightment and had nothing to do with the agency of necessity of the master," although the bottomry bond into which the master had entered was an "incident" in the "history of the case." Willmer J. had laid some stress on the fact that the ostensible nationality of the ship (*e.g.*, its Panamanian nationality) as demonstrated by her flag may be totally artificial, and Hodson L.J. seemed to agree that in such a situation the nationality of the owners rather than the flag of the ship was presumed to determine the proper law. This was, in the view of Hodson L.J., partly the explanation of *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1883) 10 Q.B.D. 521. Whatever may be thought of the learned Lord Justice's attempt to revive the law of the flag, he certainly guarded the presumption against being made an instrument of *fraude à la loi*. Nevertheless, even in the form which Hodson L.J. gave to the presumption, it is of doubtful utility in modern conditions. Other decisions, *e.g.*, that of the Court of Appeal in *The Industrie* [1894] P. 58, and that of Merriman P. in *The Njegos* [1936] P. 90, cast considerable doubt on its existence, and, it is submitted with great respect, have not been fully explained by Hodson L.J. in the light of his approach. Moreover, and this is perhaps more important, the problem of what significance should be attached to the law of the ship's nationality ought to be investigated in the light of business practice: it may well be that the case for it is stronger in the case of a charterparty (perhaps especially a time charter) than with a contract evidenced by bills

of lading issued to a shipper who is not the charterer. How important is the nationality of the vessel for a shipper of this kind, particularly where the contract has been made through brokers? Is it quite realistic today to try to uphold the generality of a presumption laid down by Willes J. in 1865, in the face of changed business habits and the development of many different types of contracts of affreightment? Be that as it may, Singleton and Birkett L.JJ. were much more cautious than Hodson L.J. in their approach to the law of the flag. Singleton L.J. admitted that "you must come down on the side of the flag if there is nothing pointing in an opposite direction," but he added: "It is a position which can seldom arise," and Birkett L.J. based his ultimate conclusion in favour of Italian law on general considerations within which the flag of the ship played no more than a secondary part.

How much weight was to be given to the fact that France was and was conspicuously represented as the *locus contractus*? (The charterparty bore the heading: "Paris, Oct. 7, 1949.") Batiffol (*Les Conflits de Lois en Matière de Contrats*, Nos. 277 *et seq.*, esp. No. 285) arrives at the conclusion that in all the major countries (including this country, but with the possible exception of Germany) the courts have generally been inclined to apply the *lex loci contractus* to contracts of affreightment. It is all the more important (and gratifying) that in the instant case the three members of the Court of Appeal refused to attach any decisive importance to the *locus contractus*, although none of them adverted to the weighty objections which have often been advanced against the place of contracting as a criterion for the determination of the proper law of the contract in modern technical and commercial conditions. Is it conceivable that Turner L.J. when writing his judgment in *P. & O.* v. *Shand* (1865) 3 Moo.P.C.(N.S.) 272, would have postulated a general presumption in favour of the *lex loci contractus* if he had known about the long-distance telephone or the teleprinter? Birkett L.J. underlined the "accidental" character of the circumstance that "Paris" appeared on the charterparty and thought it was "too much to say that the contract was made in France because the correspondence would seem to indicate that all the material matters . . . were negotiated by letters and by telegrams passing between Genoa and Paris." But, with respect, this point, though of great importance, does not mean that the contract was not made in Paris, but the fact that it was made there should not be allowed to have any influence on the determination of the proper law. In the result, though not in the line of reasoning, Birkett L.J. arrived at conclusions similar to those formulated by the late Professor W. W. Cook (*The Logical and Legal Bases of the Conflict of Laws*, Chap. XIV) whose demolition of the *locus contractus* as a test of selecting the proper law appears to the present writer to be convincing.

In so far as this important case can be quoted as an authority in favour of any particular connecting factor at all, the key to its significance must, it is submitted, be found in the words of Singleton L.J. that "matters of very considerable importance are the form of, and place of, payment. In this case payment had to be made in Italian lire, and in Italy. In the circumstances of this case I regard it as a very important feature, coupled as it is with the facts that the ship was an Italian ship and that the destination was an Italian port." Birkett L.J. agreed that the contractual provision for payment of freight and demurrage charges at Naples in lire was a "factor of importance." Of the four judges who dealt with the case three, *i.e.* Willmer J. and Singleton and Birkett L.JJ., placed great emphasis on the *locus solutionis*, and this case may well be quoted in future as an authority that where Dicey's presumption in favour of the *locus contractus* clashes with that in favour of the *locus solutionis* the latter must normally be the stronger especially where (as here) both parties have to perform in the same country. As regards the contract of affreightment in particular, Batiffol (*loco citato*, No. 281, p. 255) argues with great force that the *lex loci destinationis* offers practical advantages particularly in a situation in which (as in the instant case) bills of lading have been issued and endorsed to consignees in the country in which the cargo is to be discharged.

Needless to say, Willmer J. and the three Lords Justices refused to attach any "conclusive" importance to any single connecting factor and, in accordance with the established English doctrine of the proper law, treated each of them only as an element in the determination of the law governing the contract. Some of the observations made on the nature of the proper law and of the process of determining it are of the highest interest. It will be remembered that, according to the traditional formula as, *e.g.*, embodied in the judgment of Lord Atkin in *R.* v. *International Trustee* [1937] A.C. 500, the court must, in the absence of an express intention to select the proper law, presume an intention "from the terms of the contract and the relevant surrounding circumstances." What frequently happens is, of course, that the court itself chooses that law which, in its view, the parties would have chosen as reasonable people, *i.e.*, that law which the judge (being the "reasonable man") would have chosen if he had been asked to write the contract for the parties. Here as so often the "implied intention" can serve as a protective cover behind which the courts legislate. Lord Wright's formulation in *Mount Albert B.C.* v. *Australasian, etc., Assurance Society, Ltd.* [1938] A.C. 224, is an improvement on Lord Atkin's formula: "The court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought to or would have intended if they had thought about the question when they made the contract." The present decision carries the matter

still further in the direction of realism. Singleton L.J. made the passage from Lord Wright's judgment the basis of his reasoning, but without the disturbing "or would," *i.e.*, he treated the matter as purely normative: the court must determine what "just and reasonable" persons "ought to have" intended. "All the relevant circumstances must be borne in mind, and the tribunal must find, if it can, how a just and reasonable person would have regarded the problem." Both Singleton and Birkett L.J. expressly dealt with the difficulty that the French charterers might have intended French law and the Italian shipowners Italian law as the proper law of the contract. Singleton L.J. said it was no good pointing to this fact because "that would have meant that there would have been no contract, and there is a contract"; and Birkett L.J. having repeated the time-honoured formula about the "presumed intention," confessed that he had "been confronted from the very beginning of this case with a sense of unreality." That sense of unreality was engendered by the idea that the court should determine what the parties would have intended had they considered the matter which in fact they never considered at all and on which, according to their respective counsel, they would, had they been asked, have expressed diametrically opposed intentions. Hence the court "regarding the parties as just and reasonable people" has "to say what is the reasonable inference to be drawn and what was the probable intention of the parties." This must mean that the court has to find what reasonable parties would probably have intended and, if it means this, this dictum of Birkett L.J. like that of Singleton L.J. exposes the distinction between an "implied" and an "imputed" intention as imaginary. In the absence of an express selection and of a clear indication of a common intention, *e.g.*, through an *electio judicis* or an arbitration clause, the court determines the proper law. It is unimportant whether it does so by pretending to find that the actual parties intended it or by pretending to hold that reasonable parties would have intended it. The intention of "reasonable" parties will, one may be allowed to think, normally be directed towards that system which is "most closely" connected with the contract. Not the least important aspect of the case under review is that it shows up a large part of the battle between the "objectivists" and the "subjectivists" as a fight in the clouds.

The fact that the French Government was behind the charterers could not have any significance for the determination of the proper law because the shipowners did not know anything about it. Whether, in the presence of such knowledge, it would have been allowed to influence the decision appears to be more than doubtful in view of the *International Trustee* case, *supra*.

O. KAHN-FREUND.

Sale of Goods—C.I.F. Contracts

The decision of Devlin J. in *Kwei Tek Chao* v. *British Traders & Shippers, Ltd.* [1954] 2 W.L.R. 365, is the most important authority on the law of sale of goods in general, and on c.i.f. contracts in particular, for a very long time. And, if one may say so with the greatest respect, a wholly admirable judgment it is, ranking high among that very learned judge's many contributions to the development of commercial law.

The facts, briefly, were that the plaintiffs bought from the defendants goods on c.i.f. terms, payment to be made under a letter of credit against shipped bills of lading, shipment to take place not later than October 31, 1951. The plaintiffs contracted to resell. The goods were not shipped until November 3 but the bills of lading were altered to show shipment on October 31. For this forgery of the bills the defendants were not responsible. Payment was duly made, and on arrival of the goods they were taken off by the plaintiffs and pledged to their bank through deposit of warrants. Owing to the late shipment the plaintiffs lost their contract of resale and were unable to sell elsewhere because of a serious fall in the market price. They then discovered the forgery of the bills of lading and claimed (a) return of the price, or (b) damages for breach of contract.

Devlin J. held that claim (a) failed. There had not been a total failure of consideration, for the forgery to the bills did not make them wholly void, but at the most voidable. They still constituted (i) evidence of the terms of the contract of affreightment, (ii) a valid receipt by the shipmaster, and (iii) a document enabling the holder to obtain the goods from the ship. On the other hand, claim (b) succeeded. Under a c.i.f. contract the seller is under two distinct obligations, (i) to deliver correct documents, (ii) to deliver correct goods. Here there had been a breach of both obligations entitling the buyer either to rescind the contract or to sue for damages. He could rescind either by rejecting the documents or by subsequently rejecting the goods. Alternatively he could elect to treat the breaches of condition as breaches of warranty entitling him to damages. The plaintiffs had elected not to reject the goods and they had not in fact rejected the documents. But they had been deprived of their right to elect whether to reject the documents or not, because the incorrect date concealed from them that they had such a right. Hence they were entitled to recover the difference between the market value of the goods at the date of delivery and the contract price: *James Finlay & Co., Ltd.* v. *N.V. Kwik Hoo Tong* [1929] 1 K.B. 400, C.A. This put them into the same position as if they had been able to sue the defendants for fraud, which incidentally was eminently fair for it was on that basis that the defendants would be able to recover from their supplier, the actual forger. Had the plaintiffs been

reduced to suing for the subsequent breach constituted by the failure to deliver in time, as the defendants contended, they could merely have recovered the relatively small difference in value between a November and an October shipment.

On the other hand, the plaintiffs were not entitled to recover their actual loss of profit on the subsale, for, although it was in the contemplation of the parties that the goods were being bought for resale, there was nothing to show that it was not contemplated that, if the goods were not delivered, the buyers would go out into the market and buy similar goods—thus justifying the normal "market price" measure of damages. The learned judge, amplifying what he had already said on this subject in *Heskell* v. *Continental Express* [1950] 1 All E.R. at p. 1049 added (at p. 384): "There are, of course, cases where that prima facie measure of damages is not applicable because something different is contemplated. If, for example, a man sells goods of special manufacture and it is known that they are to be resold, it must also be known that they cannot be bought in the market, being specially manufactured by the seller. In such a case the loss of profit becomes the appropriate measure of damages. Similarly, it may very well be that in the case of string contracts, if the seller knows that the merchant is not buying merely for resale generally, but upon a string contract where he will resell those specific goods and where he could only honour his contract by delivering those goods and no others, the measure of loss of profit on resale, is the right measure." This is quite the clearest and most illuminating dictum on a much-misunderstood subject that we have yet had.

The argument put forward by the defendants, namely, that the plaintiffs were only entitled to nominal damages since they still retained the right to reject the goods when received by them, necessarily involved a discussion of the vexed question of what transactions amount to "an act inconsistent with the ownership of the seller" so as to constitute "acceptance" within the meaning of section 35 of the Sale of Goods Act. The well-known case of *Hardy & Co.* v. *Hillerns* [1923] 2 K.B. 490, C.A., establishes that after delivery of the goods to the buyer, their onward transmission to a sub-purchaser constitutes "acceptance" even though the transmission takes place during the time when the seller had the right under section 34 to examine them. Did the fact that the plaintiffs had pledged the documents with their bank have the same effect? If so, the defendants' argument failed, because the plaintiffs would not have had a second chance to rescind the contract. On the view taken by the learned judge this point did not fall for decision, but happily he has given us the benefit of his opinion on it. In the first place, he rejected the suggestion that "delivery" in section 35 means anything different from its normal meaning of voluntary transfer of possession. Hence delivery had taken place when the documents of title were handed over. An act done after

the date might therefore be an act of acceptance. This was to reject the view, which some of us have favoured, that " delivery " in section 35 means physical transfer of the goods themselves, so that nothing can be an acceptance prior to the time of that transfer. But the learned judge's opinion on what acts will be deemed inconsistent with the seller's ownership produces much the same practical result. In his opinion, the buyer who has taken up documents has a conditional property—conditional upon non-rejection after examination. If the buyer should validly reject, the property would then revest in the seller. Hence an act, to constitute an acceptance, had to be something more than a mere dealing with this conditional ownership, it had to be inconsistent with the sellers' reversionary interest. A pledge or sale of the documents of title cannot be such an act, for it merely purports to deal with the conditional property. This highly desirable conclusion seems essential if the c.i.f. contract is to fulfil its commercial purpose.[1] On the other hand, a physical delivery of the goods themselves after arrival[2] is an act inconsistent with the seller's reversionary interest for it interferes with the seller's right to retake the goods at the place of examination (*cf.* section 36). What is still left obscure is whether anything less than a physical removal of the goods from the place of examination can be such an act. The judgment distinguishes between a dispatch of the goods on the one hand (acceptance) and a sale of the documents on the other (non-acceptance). But what is the position if the buyer, after arrival of the goods, sells them at the port while the time for examination is still running and if, before that time has run out, the sub-buyer (and subsequently the original buyer) purport to reject? If the test is " onward dispatch " there is no acceptance. If the test is " dealing with goods as opposed to dealing with documents " there is acceptance. It is greatly to be hoped that the former view will ultimately prevail.

But, on the whole question of acceptance, it is respectfully submitted that the law can only be brought into full accord with business convenience if *Hardy* v. *Hillerns* is overruled. This decision holds that section 35 is the governing section and that section 34, providing that the buyer shall not be deemed to have accepted until he has had a reasonable time for examination, is subsidiary to it. For this conclusion the wording of the Act gives no warranty and the practical results are unnecessarily harsh.

[1] The judgment (at p. 383) draws attention to the difficult questions that might arise between the buyer and the bank to whom he has pledged the documents. It can hardly be the intention of the buyer to abandon his right of rejection because of the pledge; on the other hand it can hardly be the intention of the bank that it shall run the risk of losing its security because of an exercise of this right. The learned judge's advice—that banks should expressly cover this point in the conditions which they impose—will doubtless be taken to heart by those concerned.

[2] *Hardy* v. *Hillerns*, *supra*, and *cf.* *Ruben* v. *Faire* [1949] 1 K.B. 254 (noted in 12 M.L.R. 368)—a particularly hard case.

If the buyer rejects, it is doubtless fair that he should make the goods available to the seller at the place envisaged for examination. But this can be accomplished by compelling him to redeliver the goods, if the seller so requires, to that place. The mere fact that they have temporarily left that place seems irrelevant. The view taken in *Hardy* v. *Hillerns* makes it dangerous for the buyer to deal with the goods until after he has examined them and penalises him for engaging in the customary practice of passing the goods to those to whom he has sold them under the ordinary string contract, leaving the examination to them.

In the meantime the learned judge has done everything possible to a court of first instance. The whole of his masterly judgment merits the most careful perusal.

L. C. B. G.

DUTY OF LICENSOR

IN *London Graving Dock* v. *Horton* [1951] A.C. 737, a majority of the House of Lords, through some swing of the judicial pendulum towards restricting the area of tortious liability, reduced the scope of the invitor's duty of care to its narrowest permissible extent by relieving the invitor from his duty where the danger in question is simply known to the invitee. In *Hawkins* v. *Coulsdon & Purley U.D.C.* [1954] 1 Q.B. 319, the Court of Appeal, when confronted by the issue of the licensor's duty of care, took the opportunity of establishing it at the furthermost limit allowed by the present state of the law.

The facts involved the licensor's duty in its most refined form. As landlords of a certain house, the Coulsdon and Purley U.D.C. remained in possession and control of the stone steps leading from the front door. One of the steps had been badly broken for at least a year before the plaintiff's injury and, at night, the steps were cut off from the light of the street lamp by a fir tree standing between the steps and the lamp. The council, through its appropriate servants, knew of the broken step and its unilluminated condition at night, but, on the evidence accepted by the court, did not in fact appreciate the risk inherent in the situation.

On the night in question, the porch of the house was unlighted so that the steps were in complete darkness. When leaving after a visit, the plaintiff, a friend of the occupant of the house, slipped on the broken step and was injured. Held: *vis-à-vis* the council, the plaintiff was a licensee, in respect of whom the council had broken their duty of care as licensors. Two main arguments were raised for the defence:

(1) If a licensee will walk in darkness when he cannot see whether there is danger or not, he walks at his peril: *Latham* v. *Johnson* [1913] 1 K.B. 398, 411; *Mersey Docks & Harbour Board* v. *Procter* [1923] A.C. 253, 274; *Addie* v. *Dumbreck* [1929] A.C. 358,

371. The court rejected this as a rule of law, holding that, in the application of the law of licensor and licensee, darkness is simply one circumstance among others to consider. While a licensee might reasonably expect danger underfoot on waste land or open ground, this was not normally the case for man-made roads, footpaths or steps. Darkness in suburbia does not generally excuse traps.

(2) A licensor is liable only for unusual dangers of which he actually knows. Here, the licensor knew of certain facts but, since he did not recognise the danger constituted by them, he had no actual knowledge of the danger itself. The test of whether a licensor knows of a danger is, it was argued, a subjective one. This argument too was rejected.

Many judicial utterances could be urged as tending to support a subjective test, *viz.*, *Gautret* v. *Egerton* (1867) L.R. 2 C.P. 371, 375; *Hayward* v. *Drury Lane Theatre* [1917] 2 K.B. 899, 913–4; *Coleshill* v. *Manchester Corporation* [1928] 1 K.B. 776, 792; *Purkis* v. *Walthamstow B.C.* (1934) 151 L.T. 30; *Coates* v. *Rawtenstall* [1937] 3 All E.R. 602, 604; *Ellis* v. *Fulham B.C.* [1938] 1 K.B. 212, 221, 222, 223, 224, 227, 231; and *Sutton* v. *Bootle Corporation* [1947] K.B. 359, 362, 365. But the Court of Appeal chose to follow the line of dicta that favoured or did not view with disfavour an objective criterion, *viz.*, *Cooke* v. *Mid. G. W. Ry. of Ireland* [1909] A.C. 229, 234, 241; *Lowery* v. *Walker* [1909] 1 K.B. 173, 190; *Glasgow Corporation* v. *Taylor* [1922] 1 A.C. 44, 53–4; *Fairman* v. *Perpetual Investment B.S.* [1923] A.C. 74, 86, 96; *Addie* v. *Dumbreck*, *supra*, 365 (but see *Coates*, *supra*, 606; *Ellis*, *supra*, 221); *Baker* v. *Bethnal Green B.C.* [1945] 1 All E.R. 135, 140; and *Pearson* v. *Lambeth B.C.* [1950] 2 K.B. 353, 361–2.

Thus, the rule laid down in *Hawkins* is that, where a licensor knows of facts constituting, on his premises, a danger which the licensor does not personally appreciate, but which a reasonable man would have appreciated, then, knowledge of the danger itself will be imputed to the licensor in question. Of course, in ninety-nine cases out of a hundred, a licensor with knowledge of the relevant facts will also understand the danger involved. In the hundredth case of *Hawkins* v. *Coulsdon & Purley U.D.C.*, knowledge of the danger was, on the facts, imputed to the licensors.

The policy reasons given by Romer L.J. for preferring the objective test are, with respect, sound: "First, it dispenses with the need of inquiring whether in any given case a licensor did in fact know of the potentiality of danger—an inquiry which involves, I suppose, research into both the conscious and the subconscious mind. . . . Secondly, the subjective test unduly favours the thoughtless or stupid man and puts an unwarrantable premium on carelessness" (at 340).

It may be remarked that if the defendants had, through lack of adequate inspection, failed to ascertain the existence of the physical facts which formed the danger, they would not have been

liable *qua* licensors; though they would, had they been invitors. This is now the size of one of the remaining points of difference between the respective duties of invitors and licensors. The zone of distinction formerly thought to exist between the respective duties of invitor and licensor has been compressed, over the past few years, to a narrow line.[1]

C. Grunfeld.

Negligence and Liability for Dangerous Premises

In *Dunster* v. *Abbott* [1954] 1 W.L.R. 58, Denning L.J. has (at p. 62) pointed to a distinction, implicit in the cases dealing with the liability of occupiers of land, which has not hitherto been explicitly affirmed in judicial statements. The distinction is that between liability "in regard to the static conditions of premises," and liability "in regard to current operations, that is, to things being done on the premises, to dangers which are brought about by the contemporaneous activities of the occupier or his servants or anyone else." With regard to the former liability it is necessary to consider the status of the plaintiff, whether he be invitee, licensee or trespasser. With regard to the latter liability these categories are irrelevant. The distinction can perhaps be explained by reference to the two cases of *Robert Addie and Sons* v. *Dumbreck* [1929] A.C. 358 and *Excelsior Wire Rope Co.* v. *Callan* [1930] A.C. 404, in which it was implicit.

These cases form one of the pairs of cases on which students have been accustomed to sharpen their faculties for "distinguishing." The usual basis adopted by commentators for distinguishing these cases has been that they differ in their facts, and various writers have noted various factual distinctions, both reported and unreported (as to unreported factual distinctions see Salmond on *Torts*, 10th ed., p. 492, note (*s*)). It might be thought, since quite a number of distinctions of fact have been suggested, that the two cases differ notably. On the other hand, each commentator finds the two cases similar but for the fact that he characterises as the distinguishing one. In accordance with this, it might be thought that the differences exist only in the eyes of the beholders. Certainly another basis exists for distinguishing the two cases. According to this basis, which happens to be the one stated by the Lords in the *Wire Rope* case, the two cases, however alike in their facts, differ by reason of the issues of law with which they were concerned. *Addie* v. *Dumbreck* was concerned with the duty owed "in regard to the static condition of the premises." It was argued on that basis, and judgment was given on that basis. The mere

[1] One may, here, do no more than draw attention to the excellent discussion in the judgment of Denning L.J. of (i) the spurious antithesis between acts of commission and acts of omission by an occupier, and (ii) the historical reasons for the very restricted character of the licensor's duty of care.

existence of the haulage system on the premises was conceived by the plaintiffs to be a danger in respect of which the defendants were liable. In this connection the characters of, and duties to, licensees and trespassers were the crucial factors, and in so far as the plaintiffs were trespassers it was necessary to prove recklessness. In *Excelsior Wire Rope Co.* v. *Callan*, however, the case was presented to the court on a different basis. A simple issue of negligence in operating a haulage system was presented. Of course, the operations had to be conducted on land; our courts are as yet only concerned with terrestrial affairs. But the distinctions between trespassers and licensees were immaterial, and recklessness was not necessary. Had the House of Lords been required to consider only the question whether the defendants owed a duty to the plaintiffs in respect of their occupation of the land they would have been bound by the law laid down in *Addie's* case, which, it is submitted, was not distinguishable on the facts. Vice versa it is submitted that had the House of Lords in *Addie's* case been presented with a simple issue of negligence in working the haulage system their decision could have been for the plaintiffs. One thing is clear whether or not the cases are distinguishable on the facts, they are distinguishable in respect of the issues of law. This is essentially the distinction suggested by Lord Wright in *Glasgow Corporation* v. *Muir* [1943] A.C. at p. 461.

In *Dunster* v. *Abbott* both the issues of negligence and of the duty of occupiers of land for their condition were raised. The plaintiff was a canvasser who had been asked by the defendant's wife earlier in the day to call and see the defendant at night. Access to the defendant's house involved crossing a bridge over a ditch, which was, of course, clearly visible by day. When the plaintiff called again the defendant did not wish to do business with him, and the plaintiff walked away from the house along the drive towards the bridge. Before he reached it the defendant switched off an outside light on the wall of the house which had illuminated the drive. The plaintiff instead of crossing the bridge fell into the ditch, and the action was brought in respect of the injuries sustained. All members of the Court of Appeal held that there had been no negligence in switching off the light. They also all held that the plaintiff was not an invitee but a licensee. Denning L.J. (agreeing on this point with the trial judge, Ormerod J.) considered that it was immaterial whether the plaintiff was an invitee or a licensee. He said "In this case, however, it does not matter whether the plaintiff was an invitee or a licensee. That distinction is only important in regard to the static condition of the premises. It is concerned with dangers which have been present for some time in the physical structure of the premises. It has no relevance in regard to current operations. . . . In regard to current operations, the duty of the occupier . . . is owed alike to all persons lawfully on the premises who may be affected by his activities, and it is the

same whether the person injured is an invitee or a licensee, a volunteer or a guest." [1]

It is submitted that the limitation drawn by Denning L.J., confining the duty to use reasonable care to those lawfully on the premises, is at least not absolute. The occupier of a country house, who, by failing to keep a proper look-out when motoring along his own drive, injures a pedestrian on it, does not escape liability, even in the absence of recklessness, because the pedestrian was a trespasser. That would be contrary to the principle of *Excelsior Wire Rope Co.* v. *Callan*. On the other hand, of course, there may be circumstances in which a defendant would be negligent in regard to invitees and licensees and not in regard to trespassers: he may reasonably be expected to be aware of the possible presence of the former and not of the latter. This, however, follows from the conception of negligence, not from a categorisation of duties to different kinds of persons on land.

In view of recent assertions that Denning L.J. is prone to set aside authority, it is relevant to note how in the case which is the subject of this comment Denning L.J. arrived at his "novel" proposition of law. The Lord Justice does not disregard precedent. One method he employs in dealing with particular precedents is to show their relation to other precedents which have been overlooked. The other method is to analyse the precedents cited and to indicate that the basic principle that underlies them has been misunderstood, sometimes because the necessity for disengaging it from vanished social conditions has not been fully realised. The latter method is the one adopted in *Dunster* v. *Abbott*, but both methods are in accord with the spirit and traditions of the common law.

J. L. Montrose.

Estoppel by Judgment against an Executor

In the recent case of *Marsden* v. *Regan* [1954] 1 W.L.R. 423, the Court of Appeal brushed some of the cobwebs from an old and crusted part of the law as to executors. It was considering the technical rule that a judgment against an executor for a sum of money operates as a conclusive admission of assets to satisfy all debts, including the judgment. This is of course an example of estoppel by judgment. The reason for the rule is that an executor can always plead no assets or *plene administravit* when sued in his representative capacity. The rule appears in the reports as early as 1700, in the case of *Rock* v. *Layton*, 1 Com. 87; but the courts have still not worked out all its implications. Its practical importance is that if the sheriff returns *nulla bona testatoris*, after

[1] See further his remarks in *Hawkins* v. *Coulsdon and Purley U. D. C.* [1954] 2 W.L.R. 122 at p. 129 *supra*.

such a judgment, the court will presume that there has been a waste of assets, without further evidence, and will hold the executor personally liable.

The proceedings in *Marsden* v. *Regan* arose under the rarely invoked equity jurisdiction of the county court. By earlier proceedings, the executrix of a small estate had been sued for the rent of premises in which she had carried on a business that had belonged to the deceased. The landlord obtained judgment. Execution issued on this judgment but the sheriff made a return of *nulla bona testatoris*. The landlord then brought these proceedings, in which he alleged a devastavit and sought an order against the executrix personally. The county court judge dismissed the action and the landlord appealed.

In the judgments in the Court of Appeal it is made clear that, although the admission of assets is conclusive, the presumption arising from the sheriff's return is rebuttable. In this respect, the Court of Appeal approved the decision of Farwell J. in *Batchelar* v. *Evans* [1939] Ch. 1007. Before this decision, it had been suggested that the presumption is an irrebuttable one. But it is still not clear what evidence may be brought to rebut this presumption. In *Batchelar* v. *Evans* it was proved that the executor had parted with the assets to a receiver appointed by the court. In the older case of *Leonard* v. *Simpson*, 2 Bing.N.C. 176, it was suggested by Tindal C.J. that it would be enough to show that the sheriff had been unable to levy execution through some fault of his own. Apart from such exceptional cases, it is submitted that the class of admissible evidence must be very limited. It cannot be admissible to show payment of a debt, for such evidence would be contrary to the admission of assets. There being such a debt, the executor should have pleaded no assets in the original action. It seems to have been tacitly accepted by the Court of Appeal in *Marsden* v. *Regan* that destruction of the assets, without fault on the executor's part, would rebut the presumption. The defendant tried to show this but was held to have failed on the facts. It is to be regretted that the Court of Appeal gave no general guidance as to the sort of evidence which may be admitted against the presumption.

On the other hand, the Court of Appeal did decide in the plainest terms that the admission of assets by the executor does not cover any sum awarded for costs in the original action. This is a point of considerable interest which has never before been the subject of argument or decision. The Court of Appeal took the view that this admission could not relate to the costs, for these would not have been taxed and therefore were neither due nor even ascertained at the date of the original judgment.

Among the other rulings in this case is an important one that concerns trustees generally, and not only executors. Section 61 of the Trustee Act, 1925, has, of course, been closely scrutinised

in scores of reported cases. It is therefore a little odd that the word "fairly," which occurs in the phrase "and ought fairly to be excused," seems never before to have been judicially construed. In *Marsden* v. *Regan*, Evershed M.R. stated that he took this word to mean "in fairness to the executor and to other people who may be affected." On the whole, this would appear to be a reasonable construction of a word which the draftsman may not have intended to have too precise a meaning. It is arguable from the context that it means no more than "in fairness to the trustee." The great purpose of section 61 is to aid the trustee who has been caught unawares by one of the many traps that beset all trustees. But although this meaning might serve in many cases it would not serve in all. In *Marsden* v. *Regan*, for instance, the executrix had paid everybody except the plaintiff, whose claim had been persistently ignored. As Evershed M.R. put it: "He alone, so to speak, was left unprovided for and in the cold." In circumstances like these, it is plainly right that the court should balance the interests of the persons entitled to the trust fund against the interests of the erring trustee.

Death Duty Avoidance

The decision of the House of Lords in the Scottish case of *Sneddon* v. *Lord Advocate* [1954] 2 W.L.R. 211 will rejoice the hearts of those who seek to minimise liability to estate duty by gifts *inter vivos*. Estate duty is payable on such gifts if the donor dies within five years (one year if the gift is to a charity) of the gift. The gift has to be valued as at the date of death, but this does not enable the Revenue to follow the gift into property into which it has been converted and to value that. Thus if, as in *Sneddon's* case, the donor gives £5,000, duties are payable on £5,000 and not on the value of securities purchased by the donee with the £5,000 and, at the date of death, worth £9,250.

This, on the face of it, seems fair enough. But note the remarkable results. A gives 1,000 shares then worth £10,000 to his children. After the gift the company makes a nine-for-one bonus issue with the result that the 1,000 shares originally given become worth only £1,000. On A's death, duties are payable on £1,000 only: *Att.-Gen.* v. *Oldham* [1940] 2 K.B. 485 (C.A.), which their Lordships quoted with apparent approval. It was formerly believed that this did not apply if the donor *settled* the shares on his children, by vesting them in trustees on the trusts of a family settlement. In that event, it appeared from *Re Payne* [1940] Ch. 576, that duties would be payable on the value of the trust funds in whatever state of investment they happened to be at the date of death—so that the value of the bonus shares would have to be included. In *Sneddon's* case, however, the £5,000 had been settled and the House disapproved *Re Payne* which, if not technically overruled, may safely

be taken to be bad law. The *Oldham* device is therefore available whether shares are the subject of an outright gift or are settled. One wonders how long it will be before the Revenue stop up this loophole by an amendment to the statutory provisions. However, there is no such general amendment in the Finance Bill of 1954 in its original form, although clause 27 (5) does deal with the point in certain cases when it might otherwise operate to the detriment of the tax-payer!

L. C. B. G.

Extermination of Rabbits—"Clean Hands" Doctrine

The main decision in *Mason* v. *Clarke* [1954] 2 W.L.R. 48, was the salutary one that a farmer may, in the interest of good farming, gas rabbits on his land notwithstanding the fact that his landlord reserved the game and rabbits. The interests of the farmer are paramount, both as a matter of implication in the lease and under the Ground Game Act.

More doubt attaches to the second point of decision in the case, which may be regarded as the high-water mark of the doctrine that "he who comes to equity must come with clean hands." The landlord orally leased the rabbiting rights to P., who paid £100 and received a receipt saying that the money was paid as a contribution towards the bailiff's wages. This statement in the receipt was untrue, because it was no part of the agreement that the money should go towards any bailiff's wages. Since P. had no grant under seal, he had no profit at law, and the question was whether he had a profit in equity. The Court of Appeal unanimously decided that he had not, since the form of the receipt soiled his hands. Denning L.J. took the view that the receipt being patently false, must have been done with a dishonest motive; this dishonesty of motive, whatever precisely it may have been, prevented P. from obtaining specific performance, and so defeated his equitable title. Romer L.J. agreed except that he was prepared to find precisely that the motive was to defraud the Revenue. Somervell L.J. concurred with both judgments.

So far as can be gathered from the report, there was no agreement between P. and the landlord that the receipt should be in the form it was. The first that P. knew of the form of the receipt was when it was given to him. Now the rule is that a person paying money has no legal right to demand a receipt. Refusal to give a stamped receipt is an offence under the Stamp Act, 1891, s. 103, but this does not confer a private right. Perhaps a debtor could validly make the giving of a receipt a condition of his payment, though even this was formerly denied (Halsbury, vii, p. 201, note (*r*)). But if (as is usual) he pays without mentioning a receipt, it seems that no civil action would be open to him to obtain one. This is

a strange and inconvenient doctrine, but it has never been questioned, and it means that if P. in this case had refused the receipt tendered to him, he might have been denied one altogether. And, according to Denning L.J., without a written document he could not have exercised his rights.

Again, the fraudulent intention existed solely in the mind of the landlord; it was not one to which P. was in any way a party, or which he in any way furthered. P. did not use the receipt in any dealing with the Revenue, nor did he make or agree to make any false statement.

Apart from this doubt on the facts of the case, it may be questioned whether there is utility in modern law in perpetuating the distinctive equitable doctrine of clean hands. The common law doctrine of illegality in contract is already very wide—some may think too wide (although the Court of Appeal in the recent case of *Marles* v. *Trant* [1954] 1 Q.B. 29 have shown some evidence of a determination to restrain it within reasonable bounds).

Is there any necessity for adding to it a clean hands doctrine in respect of equitable remedies? The clean hands rule was perhaps intelligible when equitable remedies represented the extraordinary intervention of a court of conscience, but would it not be more in keeping with modern needs to regard specific performance as it is regarded on the Continent—an ordinary part of the administration of justice?

A question not easily answered from the report is whether the same result would have been reached under the common law doctrine of illegality. In other words, would the tainted receipt have prevented P. from suing on his contract at common law? Denning L.J. seemed to think it would, for he cited *Alexander* v. *Rayson* [1936] 1 K.B. 169, which was an action at law for money due. That, however, was a very different case, because there the agreement itself was in fraudulent form, and the fraudulent purpose was in the mind of the plaintiff, not of the defendant. It can hardly be supposed that if a man makes a promise for which he receives money, and then gives a receipt for the money as towards his bailiff's wages, he is not liable on the promise or liable to refund the money. Such a view would make the illegality doctrine itself an instrument of fraud.

Glanville Williams.

Murder—Mens Rea—Mistake of Fact

The decision of the Privy Council in *Thabo Meli* v. *The Queen* [1954] 1 W.L.R. 228 deprives students of the criminal law of an interesting moot problem. D. strikes P. over the head intending to kill him; mistakenly thinking him dead, he rolls him over a cliff to make it look like an accident. P. dies from exposure. The

argument against a conviction for murder is, of course, that when D. struck the blow he did not kill; when he did kill he did not realise he was doing so. This argument was rejected by the Board, which held, in the quaint language of the law, that it " was really one transaction."

Lord Reid said: " There appears to be no case either in South Africa or England, or for that matter elsewhere, which resembles the present." In fact the question had been decided in the same sense in *Jackson* v. *Commonwealth* (1896) 100 Ky. 239, and in the opposite sense in *Khandu* (1890) I.L.R. 15 Bom. 194.

Glanville Williams.

Guests and Lodgers at Inns

In *Daniel* v. *Hotel Pacific Pty., Ltd.* [1953] A.L.R. 1043, the Full Court of the Supreme Court of Victoria decided that the appellants (plaintiffs), who had booked in advance to stay at a common inn at a seaside resort for periods of from nine to twenty-one days and stayed there pursuant to booking, were lodgers, not guests, with the result that the innkeeper did not come under the common law duty of insuring the safety of their belongings; since the trial judge had found that there was no negligence, the appellants lost their action for the value of belongings stolen from the hotel safe.

The majority judgments (Herring C.J. and Lowe J.) accept the distinction between " lodgers " and " guests " worked out in a series of English decisions beginning in the sixteenth century. There have been very few English cases on the question in the past century and none involves facts similar to those of the instant case, but the problem has arisen frequently in the U.S.A. and the dissenting opinion of Sholl J. refers fully to the American literature.

It is reasonably clear that the concepts of " lodger " and " guest " in this context are vague and unsatisfactory. The history of the law is traced in detail by Sholl J. As His Honour shows, the difficulty arises from the disappearance both of the old social justification for such distinctions, and of many of the objective criteria which were once significant and comparatively easy to apply. The common law duty of inns to receive guests, with the corresponding privilege of a lien and obligation to insure safety of the guests' goods, were for the benefit of " travellers," meaning persons who were in an obvious commonsense fashion " *transientes*." When a person settled down in an inn for an appreciable period, as for a seaside holiday, he was not " *transiens* " and was clearly outside the social justification which existed in days of indifferent and dangerous transport conditions and bad communications for special rules applicable only to travellers. Even then, the difficulty of deciding just when a " traveller " became a " boarder " was appreciated, and Dodderidge J. seemed disposed in 1625 to borrow from

the ancient law on the responsibility of innkeepers for the keeping of peace by their customers further distinctions between the "uncuth" (first night), the "hospes" (second night) and the "hogenhive" (third night).

Although conditions of travel today have altered so materially, there might still be some justification for retaining the old distinctions if "traveller" were treated as meaning only the person who requests accommodation at an inn with no previous communication and who is prepared to take what he can get; *pace* Sholl J. some such test is at least hinted at in a number of the cases. But the cases have removed from the definition of "traveller" any requirement that he should be "*transiens*"; see especially *Williams* v. *Linnitt* [1951] 1 K.B. 565; and have also gone some distance towards removing the requirement that the traveller should arrive unannounced; see especially *Constantine* v. *Imperial Hotels, Ltd.* [1944] K.B. 693. The cases on previous booking do not go the full length of obliterating the distinction between "taking what you get" and obtaining a promise for specified accommodation; it is quite consistent with booking ahead that the customer should expect to get some accommodation but not any particular room. But as Sholl J. insists, the modern practice of booking accommodation ahead is widespread and sensible, and a law which rests on fine distinctions between shades of meaning in such bookings is unsatisfactory. The tendency of the decisions is to obliterate objective *differentia* which can be readily applied and to rely upon a judicial intuition as to the character in which a customer arrives at or subsequently stays on at an hotel.

However, even if a higher tribunal were prepared to adopt Sholl J.'s destructive analysis of the older law and seek redefinition of its concepts, the judges could still be very much divided on the policy questions involved in such a task. The majority in the instant case were impressed with the absurdity of an innkeeper being under a different liability from neighbouring lodging house keepers in respect of customers who could equally well have stayed at a lodging house and who made their arrangements in all respects as if the inn had been a lodging house. Sholl J. was impressed with the absurdity of the holiday-maker who happens to have booked his accommodation at an inn being in a worse position than a holiday-maker who takes his chance of securing accommodation without booking and stays from day to day for the same period as his more methodical fellow-customer; his Honour was also bothered by the possibility that the decisions might end with any customer at an inn who books his accommodation ahead being treated as a "lodger" even though he is in the most old-fashioned sense "transiens."

There are some very complicated policy questions involved in these dichotomies. Should inns be permitted to operate as lodging houses, to the detriment of the provision of space for the bona fide

traveller? Should the duty to receive, the insurance principle and the lien be abolished, having regard to the small number of travellers under modern conditions who fail to book ahead? Should the principles of lien and of insurance both be extended to lodging-house keepers of all kinds? The difficulty of making such decisions is sufficiently great without the added difficulty of concealing the policy decision by fictions of definition. Hence perhaps the task of adapting the old law is now beyond even the legislative dexterity of a Denning L.J., and should be carried out, as Sholl J. suggests, by the legislature.

G. Sawer.

REVIEWS

HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935. Edited by MARK DE WOLFE HOWE. 2 vols. [London : Geoffrey Cumberlege at the Oxford University Press. 1953. 1650 pp. (with index). £4 4s. 0d. net.]

IN a letter to Sir Frederick Pollock dated July 12, 1916, Justice Holmes asked Pollock "did you know Harold Laski, an astonishing young Jew, whom Frankfurter brought over here the other day?" During the following twelve months or so Holmes refers more than once to Laski in his correspondence with Pollock, and always in superlative terms—"one of the most very learned men I ever saw of any age"—"an extraordinarily agreeable chap"—"diabolically clever and omniscient." This shows what an impression the youthful Laski had made at once upon the already ageing judge. But it had been a mutual liking and admiration, as appears from the first letter with which on July 11, 1916, Laski began the correspondence which was to continue its unbroken flow until the death of the great lawyer in 1935, and practically the whole of which is contained in these two volumes.

It is interesting to speculate, with several of the reviewers of this book, as to how personalities so different as Holmes and Laski could have developed, and developed so quickly, the affection and respect which shows out of all these long pages. Indeed, the speculation is more than merely interesting, it is important, for without some understanding of it the purpose of the correspondence will not be understood. Holmes was then seventy-five. I have the impression that he was, indeed always had been, rather a lonely man. Although somewhat of a pessimist by nature he had a profound faith in the future of his country, and a realisation of the important part which the law must play in it, and of the contribution which he had made and could continue to make to the development of that law, if only he could keep young, have the ability to respond fully to the underlying "necessities of the times." As he said, "one ought to have two rules—(a) to know one's subject inside out, and (b) to have an eye to what the rest of the world is doing." And therefore he must keep up with the literature—above all he must be in contact with the best of the young men, especially those from his old Law School at Harvard. So he was seeing much of that robust, forward-looking law professor Felix Frankfurter, and when the latter brought along Laski who could keep him abreast of the movements in political and sociological thought he seems instinctively to have realised that he was on the brink of a life-giving friendship, for his prompt reply to Laski's opening "bread and butter letter" was full of cordiality and the hope of further acquaintance. For the visit had been a "refreshment" to him, and in this word we have the secret of the correspondence.

Moreover, Holmes was, I think, starved emotionally, at any rate at that time; without children he seems to have developed a strong liking for more than one of his law secretaries, and Laski with his vivid personality and wider outlook gave him an object on whom he could lavish his affection.

Laski, in whom the liking for the society of the eminent, which all intellectuals have, was strongly developed, must have rejoiced greatly in the opportunity to make the friendship of one who was perhaps the greatest American of the age, and one whose contribution had lain of recent years particularly to that field of law lying on the border of politics and social development which it was his own ambition as a student of political philosophy

to explore. Already in 1916 he writes that the legal aspect of State-theory throws him "into a perspiration of mental excitement." He perhaps knew instinctively that much of the judge's best work still lay before him, and that in a sense they might be able to work together. Moreover, Laski also needed emotional support and an object for his ever generous affection. He had long passed out of either intellectual or emotional sympathy with his father, a successful Manchester business man but narrow both as regards culture and in his religious beliefs, which had led to a deep estrangement from his son, who had married a Gentile. There were thus strong reasons why a friendship should start, and develop.

Laski seems to have realised from an early stage how much Holmes stood in need of the "refreshment" which he was, as it happpened, so singularly well equipped to supply. He set himself by personal visits, and when these were impossible, as was usually the case, by correspondence, to give the old judge the mental recreation and entertainment which would help to keep him intellectually vigorous and able to keep abreast of his work. It seems to me that in large measure he succeeded, and that America, and the whole of the common law world which has been so much invigorated by the judicial thought and method of Holmes, is more in Laski's debt than it is aware. Again and again the judge acknowledges the pleasure and stimulus which he is receiving, and almost pathetically adjures his young friend not to cease writing. His gratitude and affection develop, and although the letters always commence "Dear Laski," after a time they conclude "affectionately yours."

Yet these volumes are substantially Laski's. As his technique develops he establishes a pattern of correspondence. He tells the judge of his own current doings, and these of course cover a wide and fascinating field, for he moved in political, university and legal circles at high levels; he travelled a good deal, and had friends in many lands. The episodes described frequently feature the leading figures of the day, and often in dramatic or amusing situations. In order to paint the scene more vividly Laski collects and embroiders the gossip of the times, mixes in the more amusing stories which are floating around, and embellishes the narrative with the resources of a style which at its best, and it is in these pages always completely unaffected, was one of the most readable of his generation. Holmes was clearly entertained and refreshed, and it is difficult to believe that anybody who lived through this period, and took an intelligent interest in what was going on, will not enjoy these pages just as much or more. I have indeed found that I never opened the book without deriving entertainment from it; for there are here more good stories well told than in any work I have read in many a long day.

But Holmes relied enormously on literature. When F. D. Roosevelt called on him in 1933 and found him reading Plato he told the President that he was "improving his mind." Laski realised what an essential element this was, and part of the ever recurrent pattern in the letters is his commentary on the books which he was currently reading. Few men can have ever read more rapidly or more widely. Holmes, of course, never kept up with him, but the criticism when Laski is dealing with his own subject usually has permanent value, and if on belles lettres and general literature his judgments are erratic, being too often affected by personal prejudices, they are often stimulating and sometimes penetrating.

Apart from his family, his work, and politics, Laski's main interest was book collecting. He had an extraordinary flair for picking up rare editions, and recounts his exploits with such gusto that even the reader who does not share his collector's zeal can hardly help being carried away by the excitement of the chase, the description of which forms a regular part of this correspondence. And some of his adventures, as that in the den of the

underground dealer in the City of London, are recounted in picturesque prose worthy of Dickens in his prime.

As the letters come pouring out, so the personality of the author is delineated. His tremendous vitality and energy, always at the disposal of the causes he served—how often does Holmes adjure him not "to work the machine so hard"—his generosity, particularly in helping his students, his uncritical loyalty to his friends, his contempt for those whom he felt were dishonest, or time servers, a certain intellectual arrogance, and a self-confidence which while usually well justified, sometimes lands him in pretty pickles.

The Holmes contribution to the work is certainly not so interesting. Many of his letters are hardly more than formal replies, sent partly because he was afraid that if he did not get answers Laski might cease to write. The old judge clearly feels the weight of his work in the Supreme Court bear heavily on him, and finds with difficulty the time and energy to write. In his later letters he complains repeatedly how difficult he finds writing—he is by then nearly ninety—and in 1932 he gives up the task. But it is absurd to suggest as some reviewers have done that Holmes was a very old man when the correspondence started, and had no contribution to make. After all, during the first ten years of it he delivered some of his most famous judgments—*Schenck* v. *U. S.*; *Abrams* v. *U. S.*; *Gitlow* v. *N. Y.*; to mention no more.

Indeed, in quite a number of the letters here collected, Holmes is at his best, and even at ninety-one he can produce a sprightly and amusing epistle (see that of April 9, 1932). He does not discuss legal problems, except occasionally in respect of their philosophic and political aspects, and from the legal aspect this correspondence has not got the interest of that which he conducted with Pollock. Although Laski joined the law classes at Harvard and his letters show that he found it a stimulating experience, and although he often showed a remarkable insight in his discussion of legal problems, he was not of course a lawyer, and Holmes evidently did not find it profitable to write to him at any length about such matters.

There is a great deal more that one could say about these fascinating volumes, if space permitted, but I cannot conclude without referring to the impugnment of Laski's veracity by several eminent reviewers. Thus Professor Goodhart in the *Observer* considered that "his habit of unscrupulous romancing" has in large part "destroyed the value of these letters." On the contrary, it is the romancing which so far as I have been able to find never extends to any statement in which accuracy was of historical importance, which gave to the letters their stimulating quality for Holmes, and now makes them such good reading. Of course Laski, in telling the good stories to which I have already referred, often associates himself with them. What raconteur does not? Moreover, his memory, in which he had perhaps too much confidence, was not very trustworthy in matters of detail, so that he will often narrate the same event twice in different ways, or in describing one of his book bargains more than once will mention a different price or a different seller. And similarly with his meetings with great men.

These, it may be said, are small matters, but when it is hinted that he never bought the books, or knew the men in question, it may be replied that most of these books are still in his library, and that almost any one of his friends or colleagues could name an occasion on which he had met one or other of the great men on Laski's introduction.

But Laski was, in fact, a central figure in English politics for many years, and took a quite prominent part in numerous public events of great importance, some of which he talks about to Holmes. I think that he often tends to exaggerate the part which he himself played, but that is certainly not to say that the evidence which he gives is "valueless." After all, it is the historian's business to evaluate the precise worth of his material,

and I am inclined to think that Mr. Wolfe Howe's estimate of Laski's letters, as sources for the political and social history of the period they cover, may turn out to be nearer the truth than Professor Goodhart's.

In his letter of December 13, 1923, Laski writes "*very strictly entre nous* MacDonald offered me a Cabinet post if I would fight an election." Professor Goodhart seems to use the "incredibility" of this story as a sort of acid test of Laski's general reliability as a witness. But is it really so incredible? On the face of it this was a pre-election suggestion, and MacDonald was notorious for his encouragement to Labour supporters to contest seats because they "would be wanted in the Government," and men with no better claims than Laski were in fact included. MacDonald could not, of course, at that stage, make any "firm offer"—it was not even certain that he would be sent for by the King in the event of the Labour Party winning the election. The truth of Laski's following sentence that he preferred to remain "behind the fight as an observer" could be proved from half a hundred sources.

In conclusion, I must pay my tribute to the Editor's remarkable scholarship. He has not only provided the most complete index I have ever seen, and a biographical appendix of the principal persons who figure in the correspondence, running to forty pages—it will be very useful quite apart from these volumes—but has succeeded in tracking down most of the allusions to books, articles and personalities which naturally appear in profusion in letters of this sort.

C.

Governmental Liability. A Comparative Study. By H. Street, ll.m., ph.d., Professor of Law in the University of Nottingham, Solicitor of the Supreme Court. [Cambridge: at the University Press. 1953. 223 pp. 25s. net.]

Professor Street's book is the fourth of the Cambridge Studies in International and Comparative Law. It is an important and much-needed work, which ought to be brought to the notice of those who have it in their power to initiate measures of law reform. Writers on public law problems in this country have been concerned mainly with administrative tribunals, delegated legislation, and the applications of the *ultra vires* doctrine by the courts. Studies have recently been published on American and French experience in these fields. But too little attention has been paid to issues raised by the civil liability of the State. Professor Glanville Williams' critique of the Crown Proceedings Act needed to be supplemented by a comprehensive comparative analysis. The present work goes far to meet this want. It is to be hoped that it will not survive merely as a notable piece of research, testifying to the academic distinction of its author, but that it will inspire further and more specialised investigations of some of the problems which it poses.

The historical introduction reviews developments in the Commonwealth, the United States and Continental countries as well as in England. Professor Street never wastes words, and the uninstructed reader of the highly compressed account of continental legal thought might be heard to sigh for a more leisurely expositor. The half-instructed reader should draw all the more profit from it. While the book was in the press the law in Canada was amended by the enactment of the Crown Liability Act, 1953. On the Crown Liabilities Act in the Union of South Africa, there is a helpful article (in English) by B. Beinart in (1952) 16 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 162.

The second chapter, which deals with liability in tort, is of outstanding interest. It begins with a comparison of the Crown Proceedings Act and

the American Federal Tort Claims Act. Careless draftsmanship and unjustified exemptions from liability in the British Act are acutely analysed. There is an especially devastating criticism of section 2 (6), the main effect of which is to exclude Crown liability for torts of the police. To the Australian authorities which are considered should now be added *Att.-Gen. for N.S.W.* v. *Perpetual Trustee Co.* (1952) 85 C.L.R. 189; see also articles by Geoffrey Sawer in (1951) 5 Res Judicatae 15 and Zelman Cowen in (1952) 2 U. of W. Aust. Ann. L.R. 263. Professor Street finds that the Act is "too tender to the Executive, and gives indications throughout of compromises with government departments." Among his wider proposals for reform are the extension of judicial immunity to administrative tribunals and the imposition of Crown liability for wrongful conviction. The first suggestion is unlikely to be accepted until the composition and procedure of certain tribunals are such as to command general confidence. The second suggestion has been found to be practicable in other countries; further information on this matter, derived from a comparative study, would be of value. Professor Street passes on to consider the intricacies of the French system. Here what he has to say is of the first importance. He is no uncritical admirer of the Conseil d'Etat and its *jurisprudence*. He detects an excess of reverence for the doctrine of the separation of powers and for the political activities of the State, the encouragement of irresponsibility of officials, lack of precision in certain concepts, inadequacy in the theory of damages, and undue procedural delays. (The decision in the case of *Jacquin*, which he says was delivered ten years after the commencement of proceedings, was in fact delayed until nearly thirty-four years after the cause of action arose.) But he favours the incorporation into English law of the principle of *risque*, whereby one who has suffered exceptional loss through the functioning of the governmental machine is entitled to recover damages, although no fault is attributable to the public authority in question. The general principle is an eminently reasonable one, though in its practical application it must be qualified by numerous exceptions. Professor Street sees no sound reason for conferring jurisdiction in relation to such claims upon a new type of administrative court in preference to the ordinary courts.

Most of the English books on the law of contract ignore the special characteristics of public contracts. Professor Street emphasises the gap between legal theory and administrative practice, and suggests a number of reforms, including the formalisation of standard terms in order to facilitate the development of a law of government contracts on a rational juristic basis. In this chapter a fuller examination of the scope of the *Amphitrite* principle might perhaps have been attempted. It is rather surprising to find that, in discussing contracts of service with the Crown, Professor Street accepts the proposition that the appointment of a civil servant for a fixed term is consistent with a power to dismiss him at pleasure at any time before the expiry of that term. True, such a construction is not logically impossible; but it is so strained that it should be rejected unless it can be defended by more convincing arguments than have hitherto been put forward. The discussion of the law of the civil service in the United States is marred by one of the rare misstatements in the book; the contract clause of the Constitution binds the States, but not Congress (p. 117).

The remaining chapters deal with expropriation, quasi-contract and trusts; declaratory judgments, mandamus and injunctions as remedies against the State; substantive limitations upon the liability of the State (including a penetrating review of the rule that the Crown is not bound by statutes in the absence of express words or the clearest of implications); and procedural limitations on the liability of the State. The greatest single advantage of the Crown in litigation is its absolute power to withhold the

production of a document if, in the opinion of the responsible Minister. its production would be contrary to the public interest. By the decision in *Duncan* v. *Cammell Laird & Co.* [1942] A.C. 624, the courts deprived themselves of the power to examine a document for which Crown privilege has been claimed in the appropriate manner. There are unfortunately grounds for believing that Crown privilege is sometimes asserted in circumstances where the interests of justice call for disclosure. It would be reassuring to know that government departments have paid heed to the observations of the court in *Ellis* v. *Home Office* [1953] 2 Q.B. 135. Professor Street's severe criticisms both of the law and of administrative practice in this matter are well merited.

The Crown Proceedings Act was an important achievement of the law reformers. But it would be unwarrantable complacency to assume that because Parliament has filled what the Committee on Ministers' Powers called "a lacuna in the rule of law," no further reform of the law relating to governmental liability need be contemplated for another generation. Those who agree with Professor Street that "no Crown immunities are tolerable unless their retention can be affirmatively proved to be necessary in the public interest" will be grateful for this stimulating book.

S. A. de Smith.

Administrative Law. By K. C. Davis. [West Publishing Co., U.S.A. 1951. xvi and 1024 pp.]

To a student of English administrative law, this is a fascinating, frightening and depressing book. It is fascinating because almost every page points to an American problem which has its English equivalent; frequently it points to a problem existing here but unrecognised—a concealed trap into which by chance we have not yet stumbled. It is frightening because it uncovers once more the immense amount of research and analysis needed in this country before we can begin to evolve workable rules of administrative law. In other fields of law, there sometimes arises a problem which, we are surprised to find, seems never to have arisen before, although the facts are in everyday experience. In administrative law, almost every case is of this kind. It is not surprising that the courts, forced to make law at a speed which is almost unseemly, occasionally botch the job. This book depresses only because it shows so clearly by what distance the fatherland of the common law has been outstripped by its progeny. No doubt, as we are constantly reminded, the United States is a big country with big problems. But we are a small country with big problems. It is commonly and easily said that our international problems today are due to the failure of moral development to keep pace with scientific discovery. In close and connected parallel it can be said that many of our national domestic problems are caused by the failure of the political, social and legal controls on governmental power to develop as that power has developed. Governmental power may begin by being exercised for the highest moral and public good. But if the controls are absent, the machine of administration will pay little regard to the best of intentions. There can be no doubt that the labourers in the field of administrative law in this country are proportionately far fewer than they are in the United States.

Professor Davis has written a first-class textbook. Quotation could be extensive. The analyses of the rule-making power, of the judicial function, of *res judicata* and of the scope of review contain passages of particular value to English administrative lawyers. For example: "The process of trial—submission of evidence subject to cross-examination, with a determination on the record—is the proper procedure for resolving issues of adjudicative fact. Considerable confusion in the case law results from the

frequent failure to recognise that argument rather than evidence is usually the appropriate procedure for resolving non-factual disputes about law and policy; for such disputes the cross-examination of witnesses is no more fitting than it would be for the presentation of issues of law and policy to appellate courts" (pp. 270-1). Again, an American lawyer would be astounded to learn to what an extent the courts in this country are prepared to accept the *ipse dixit* of a Minister merely because he is empowered to act "if satisfied" (see pp. 521 *et seq.*). It is comforting to find that occasionally we can sympathise in a defect common to both jurisdictions. Thus, when writing of procedures for judicial review, Professor Davis says: "The lines are moved about through discussions of such concepts as judicial, non-judicial, discretionary and ministerial. These concepts are acutely unfortunate, not only because they defy definition, but because of the complete folly of using any concepts whatever to divide one remedy from another. . . . Thousands of cases try to draw lines. The more the lines, the more the confusion. Yet the litigant must label his pleading at his peril. . . . The cure is easy. Establish a single, simple form of proceeding for all reviews of administrative action. Call it "petition for review." Focus attention then on the problems having significance—whether, when, and how much to review" (p. 719). Recently, in this country, the Court of Appeal delivered judgment in the case of *Barnard* v. *National Dock Labour Board* [1953] 2 W.L.R. 995. This, like the decision in *R.* v. *Northumberland Compensation Tribunal, ex p. Shaw* [1951] 1 K.B. 711, has been hailed by some persons, including a leader-writer in *The Times*, as a great advance in the power of the courts to control administrative bodies. In *Barnard's* case, the scope of the action for a declaration was perhaps extended; in *Shaw's* case, the scope of certiorari was restored. But how remote are these methods of "advance" from the real problems! The effect of *Shaw's* case may be to make the desired review less available, as tribunals may well become more chary of giving reasons than hitherto. The effect of *Barnard's* case is most uncertain since the court, while giving relief in that case, emphasised most strongly the discretionary nature of the remedy. The unfortunate individual may now be faced with a discretionary power in the administrative authority so loosely defined that its limits are difficult to discern without recourse to the courts. Yet, when he seeks advice on his rights of recourse, he will be told that the courts have decided to be most discreet in their control of discretion and that his chances of success or failure, though he prove all his facts, are not predictable.

For the light which it throws on the problems in this country as well as for the information it gives about those in the United States, this book deserves to be widely read. Professor Davis has earned our gratitude as well as our congratulations.

J. A. G. Griffith.

Law and Social Change in the U.S.S.R. (Library of World Affairs). By Professor J. N. Hazard. [London: Stevens & Sons, Ltd. 310 pp. 25s.]

The present book is the first major work of a distinguished lecturer and acknowledged authority on Soviet law. Beneath the deceptive facility of its pages lies much scholarship, legal and linguistic, and enormous patience in extracting grains of knowledge from the terse rulings of Soviet courts and the irritating prolixity of Soviet learned journals. Professor Hazard has watched the Soviet system grow over the last twenty years and has studied law in Moscow. His book deals with criminal law and public international law and supplements Gsovski's *Civil Law* with more recent cases and statutes. His approach is intellectually charitable rather than ideologically sympathetic.

If there are none of the propitiatory anti-Soviet undertones which mar much writing on the subject, neither is there any trace of personal commitment.

The main feature of the book is the stress on decided cases. The learned author is obviously influenced by the Case Law method of law teaching in the United States, and also wishes to guard himself against accusations of unreality, by demonstrating the day-to-day working of Soviet law in real contexts rather than the vapourings of propagandists. Legal journals are also adequately used. Legal treatises are somewhat deliberately underplayed. Since European lawyers attach more importance to treatises than cases this is a possible criticism, but no doubt any other treatment would have missed the mark and been branded as gullible in present political conditions. There are other reasons for the concentration on the law of the courts. Soviet law is still young and it is difficult to predict how far it will ever be stabilised. Soviet law reflects the vacillations of Soviet political and economic policy and performs startling evolutions. Instead of building up juridically on a stable accepted basis it changes its own fundamentals in response to outside stimuli. Hence the aptness of the present volume on law and social change. The legalistic grid between social change and legal change is very thin in the U.S.S.R. and the constant Soviet debates about basic legality and legal stability show that they are not unconscious of the precariousness of the situation. It is difficult at this late date to imagine the reaction of the reader in 1918 if some miraculous prescience enabled him to read this book. Socialisation, open or unavowed, has become so characteristic of all countries. Does the Soviet experiment suggest a self-consistent system of Socialist law? Is law bound up with individualism so that it cannot survive the transition to socialism? The second question is easier to answer than the first. Law goes on and will go on, under all circumstances (*cf.* p. 172). But of a consistent law peculiar to Socialism there is little evidence. The tendency has been for the concepts of traditional law to survive, with "variable contents." In Britain you may be entitled to own any land but a colliery, and in Russia a building but not land, but the legal approach is much the same. The legal systems reflect two different economic systems, but are not basically very different. Soviet leaders inveigh against the use of Roman concepts of legal obligations but the ghostly contest between *emptio venditio* and *locatio operis faciendi* still haunts the law of 1953 (pp. 11, 13, 14, 26, 33, 134). "Common employment" rears its head in the law of tort (237, 239) and accidents "in the course of employment" are still material (217, 218, 223). Social insurance exists, but is not very unlike our national insurance or the American social security.

The law of collective farming does, of course, differ markedly from our agricultural law, but Professor Hazard makes it very clear that it has its roots deep in pre-revolutionary history, and that it remains a transitional phase, at least in theory. Stalin emphasised shortly before his death that it was not distinctly Communist in nature. The law of bureaucratic tyranny and abuse of authority is one of the most interesting chapters (Chap. 5) in this book. The difficulties of life under a dictatorial régime are, however, not peculiar to Communism. The point at which excessive zeal becomes personal irresponsibility was often met under the National-Socialist régime in Germany, and the man whose uniform had to be upheld in public was made to feel the disgrace he had brought on it in private. A good Bolshevik is excused much stupidity in Russia, but a little Tsar is no more popular than a big one. It is also a common feature of all dictatorships that they restrict freedom of speech. We have always suspected that the constitutional guarantee of freedom of speech and public assembly had little real value, and Professor Hazard confirms this doubt (pp. 80–2, 98–9). But this again is not particularly Marxist or Communist. The régime may once have counted on the support of radical thought on free love but the Soviet family has become respectable again, though divorce is still obviously easier to obtain than in the West (Chap. 10). The idea that all criminals are victims of society dies

hard in the West. The force of fact and the force of need have killed it in the U.S.S.R. where "advanced" penal theories were once popular (p. 109). The Soviet régime, like every other, depends on the industrious and law-abiding, and represses the vicious and the idle, though it is still prone to belie the fact when seeking to overthrow other systems. The change in the functions of the trade unions is significant. There is no right to strike and the collective bargain may not deal with the most vital points involved. The union must boost discipline and productivity and gain popularity by its functions in the field of factory amenities and sick pay (pp. 229, 258, 214). (An interesting series on trade union activities in the U.S.S.R. is being published in the *Anglo-Soviet Journal*.) But in all countries trade unions are coming of age and working out policies compatible with the national interest. Farmers may be expelled from land for bad cultivation (pp. 136, 140, 146, 147) but this can be paralleled in the 1947 Agriculture Act with its supervision orders. Direction of labour is superseded by well-calculated inducements to stay on the job (pp. 186, 214, 220). Soviet patent and copyright law manifest similarities to our compulsory licence system, though in more drastic form (pp. 191, 205). A susceptible composer may not, apparently, object to an imperfect if enthusiastic rendition by the works band. A State organisation performs the functions of our Performing Right Society (p. 194). The studied inadequacy of industrial insurance leaves a place for the law of tort to make people careful and preserve the national patrimony (pp. 225, 229, 235). Perhaps the most distinctive feature of Soviet law is the field of contract between State agencies, but the use of arbitration makes this field difficult to penetrate, though Professor Hazard gives many valuable illustrations (pp. 47, 54, 56). Of course all these questions ought more fairly to be judged in comparison with what Tsarist law would by now have become, rather than what it was or what English law is today. Forced labour and the M.V.D. are hardly dealt with in this book, but they are such familiar subjects that the author may well have felt this to be unnecessary.

There are few editorial comments to be made Some of the terms employed in the book are not obviously familiar in this country, though Professor Hazard has adapted many of his illustrations to English circumstances. His references to "post audit" refer to a procedure of review by the State Prosecutor or the President of the Supreme Court to which all judgments are supposed to be subjected, and not to any operation of accountancy (pp. 141, 180, 231). "Khozrazchot" may be translated as "cost accounting" but it would be simpler to say that all Soviet organisations are required to be self-supporting and to keep to their budgets (pp. 44, 235). The policy of translation is not completely consistent. Thus the agricultural co-operative society appears as the rather mystifying "TOZ" (p. 137, 30n.), though we are spared the usual enigma "ZAGS" which is translated (p. 260) as the "bureau for registering acts of civil status." Here and there a Soviet source, whose meaning is not immediately obvious to the intelligent Western reader, is left untranslated, such as "financial and economic laws" (pp. 10 (37) and 146 (58)); "proceedings of Moscow deputies" (p. 134 (9)), "collection of treaties in force" (p. 282). Such a translation satisfies curiosity rather than supplying any need, for the specialist who wishes to consult the original must be able to understand the reference in Russian. But it is valuable as removing any air of mystery and enabling the author to hold the Iron Curtain well aside, which he undeniably does.

In view of the great value of this book and of Professor Friedmann's book on English law and social change, would it be asking too much to suggest some volumes of the same kind, say on French, Spanish or Indian law?

A. K. R. K.

PUBLIC POLICY. A comparative Study in English and French Law. By DENNIS LLOYD. [London: University of London, The Athlone Press. 1953. xxii and 166 pp. 18s.]

THERE are two reasons which make it a pleasant task to announce the appearance of this book. On the one hand it is the first monograph to appear in the recently inaugurated University of London Legal Series published by the Athlone Press, the University of London's equally young publishing organisation. On the other hand this is an interesting and scholarly work on an important subject, which not only merits being included in but is also likely to set the standard for the future volumes of the series.

Mr. Lloyd's study is primarily devoted to a detailed comparison between English and French judicial practice in the field of public policy, particularly in relation to the law of contract and to private international law. This was a sound choice for a comparative study, because in both countries it falls to the courts to develop the specific content of the rules of public policy. It has also proved a useful undertaking, because it establishes "the close similarity" (p. 147) between the solutions found in the two countries both of which recognise "that this reserve power [of public policy] is to be used somewhat sparingly and that the judge is not to set himself up as an individual censor of morals" (p. 147); in particular the idea that French practice has a tendency to abuse the notion of public order and that Anglo-Saxon countries are more respectful to foreign law, "is not only a misconception but in some respects exactly reverses the operation of those two systems" (p. 80). Finally, the general conclusions reached by the author are valuable: they show that such distinctions as do exist are not very far-reaching. There are two main contrasts. A French judge is apt to take statute law as his guide to ascertain the legally relevant policy, while in England the policy of a statute is not at present treated as necessarily indicative of public policy. Moreover, Mr. Lloyd believes that French judges prefer a subjective basis in determining public policy, while English law "displays a characteristic tendency to judge public policy by an objective standard" (p. 150)—a conclusion the substantial value of which may be a little doubtful, since it may be of a purely verbal character. Another apparent difference lies in the fact that a French judge is more willing "openly to invoke public order," while in England the existence of such an element of decision is usually hidden: but this difference largely disappears if regard is had to what judges do rather than to what they say (p. 154). Nor is it justifiable to suggest that the French courts' "open avowal of public policy as a basis of legal development" involves political dangers or that the more restrained "methods of the common law in themselves constitute a bulwark against a government of a totalitarian character" (p. 156). The reader will not fail to notice the many shrewd observations which illuminate the text. Thus it is good to read that the *obiter dicta* of English judges take the place of "an effective body of critical doctrine" on the Continent (p. 120) or that neither in England nor in France is public policy intended to or does in fact provide a "slogan or formula for the solution of deep-seated social or economic problems" (p. 142).

Although Mr. Lloyd is perhaps at his best in the purely descriptive part of his book, he has said enough in his general part to provoke thought. Thus the influence of public international law (including the United Nations Charter) on public policy is a grave problem on which one would like to have Mr. Lloyd's views (*cf.* p. 146). And is it not perhaps the anonymity of the French judge which facilitates that open avowal of public policy from which the English judge recoils, seeing that he is an individual representing the Crown and at the same time a named contributor to the history of English law? Perhaps it would have been even more important to learn something about the author's views on the actual lessons (if any) which the French

approach to public policy is apt to teach us; the pedagogic function of comparative law has, indeed, been somewhat neglected by Mr. Lloyd. Yet he has written a stimulating treatise which English lawyers will read with pleasure and profit.

F. A. Mann.

Employers' Liability. Second Edition. By John Munkman, ll.b., of the Middle Temple, Barrister-at-Law. [London: Butterworth & Co. (Publishers), Ltd. 1952. liv and 439 and (index) 37 pp. 30s. net.]

In writing this textbook, now in its second edition, the author set out to provide a reliable, specialist work dealing with the liability of employers for injuries sustained by workmen in the course of their employment. Without any hesitation it can be said that this object has been achieved with commendable thoroughness and accuracy, and, in the modern tradition, with frequent reference to Scottish and Irish cases and also to Canadian, New Zealand and American authorities. The learned author has, in truth, flung his net far and wide and, certainly so far as the English authorities are concerned, very little that is of any importance or relevance seems to have been left out. However, with the solitary exception of Lord Wright's criticism (67 L.Q.R. 532) of the decision in *London Graving Dock Co.* v. *Horton* [1952] A.C. 737 and an article on the same case in the *Scots Law Times*, there is a curious lack of any reference to periodical literature. This is particularly noticeable in those sections of the book dealing with the more general aspects of an employer's liability for negligence or for breach of statutory duty.

As a succinct account of the influence exercised by social and economic conditions on the development of the law relating to the rights of workmen in cases of personal injury, the opening chapter is admirable. Clearly traced by the author is the radical change which has been brought about from the position, existing a hundred years ago, when the dominant mood was one in which every workman was expected to look after himself, to the present emphasis on the duty of employers to take proper steps to protect their employees, notwithstanding the expense, even when they are engaged on other persons' premises. A substantial portion of the book is naturally taken up with a detailed, annotated analysis of the Factories Act, 1937, the Coal Mines Act, 1911, and the associate regulations dealing with shipbuilding, docks, building, electricity, metalliferous mines and quarries. Every reported decision dealing with one or other of these enactments would appear to have been included in the book, thus acquiring the attribute, so far as practitioners are concerned, of being the acknowledged storehouse to which reference can be made. Detailed classifications are resorted to (*e.g.*, pp. 105–9) which add nothing to the general treatment of the subject and raise doubts as to whether they serve any useful purpose. On the other hand, salutary warnings are given by the author that the endless illustrations, which abound in this work, are not to be regarded as necessarily authoritative, being concerned, as often as not, with pure questions of fact.

How very different is the readable style adopted by the author in the remaining parts of the book, wherein he discusses (*inter alia*) the general principles of negligence, the employer's personal duty to take care in providing and maintaining proper machinery and a proper system of working, the general principles governing breach of statutory duty, contributory negligence, voluntary assumption of risk, and damages for personal injuries. These chapters provide a sound, albeit at times (*e.g.*, the treatment of remoteness of damage, *novus actus interveniens*, and vicarious liability) a somewhat cursory examination of the relevant principles and cases. In particular, when dealing with the rights of a workman-licensee, who is injured on another person's

premises, no indication is given (other than a brief reference to *Pearson* v. *Lambeth Borough Council* [1950] 2 K.B. 353) of the existence of the debated question—is it necessary for the licensee to show that the licensor appreciated the risk involved or is it enough to show that the licensor knew the physical facts constituting the danger and ought to have appreciated the risk involved? All the earlier authorities on this problem are examined by the Court of Appeal in *Hawkins* v. *Coulsdon and Purley U.D.C.* [1954] 1 Q.B. 319, to which reference will undoubtedly be made in the next edition. Moreover, in the discussion of the defence of *novus actus interveniens* mention might usefully be made of the application of the reasonable foreseeability test in *Shearer* v. *Harland* [1947] N.I. 102, and *Davies* v. *Liverpool Corporation* [1949] 2 All E.R. 175. There is an ample index and table of cases, both of which are indispensable adjuncts to any textbook primarily intended for practitioners. Of the practical importance of the subject-matter covered in this work nothing need be said, but it is certain that the needs of those engaged in this sphere—lawyers, insurers, inspectors of factories and industrialists—are more than adequately provided for by this book.

J. Ll. J. Edwards.

The Elements of Roman Law with a translation of the Institutes of Justinian. Third Edition. By R. W. Lee. [London : Sweet & Maxwell, Ltd. 1952. 489 pp. 30s. net.]

All the reviewers of the first edition of Professor Lee's delightful textbook were agreed that it was going to be popular and successful, and it is sufficient recognition of the correctness of their predictions and of the value of the work that within a space of about eight years the first edition has been reprinted three times (once with corrections) and that now the book has in addition reached its third edition. The present edition is in the nature of a reprint and has introduced little new matter. There are a few minor alterations in the text, a few additional footnotes interspersed in rather unsuspected places. The purpose of the author was clearly, with the exception of an important addendum on the *actio Publiciana* at the end of the book (p. 474), to make essential corrections rather than change the plan of the book. This plan was set out in the preface to the first edition, and the author has, in spite of several criticisms and suggestions, clung to it steadfastly—see preface to second edition. He has, however, made one important concession. Doubt had been expressed about his scheme of enticing students to read Justinian's Institutes by providing them with a translation only, and thereby sacrificing the Latin text. Professor Lee appears now to have found the perfect answer, and it is gratifying to learn that the publishers will soon make available a Latin text at a modest price and as a companion to this book.

The present reviewer has always found Professor Lee's textbook and its method valuable and useful. The "Institutional" method correlates text with commentary and exposition, and the choice of Justinian's Institutes enables this to be done by presenting Roman law in its final (even if not its most classical) form, and supplying the (remarkably compressed) historical and classical background where necessary; the author even improves on this by providing some translated passages from Gaius for historical purposes as well as for purposes of contrast. At the same time he draws "direct attention to some features in the landscape" of modern legal systems, and makes enlightening references to English and Romanistic jurisprudence. Perhaps, however, the book is, in certain respects, a little too "Institutional." There is a tendency sometimes to deal with only that law which the compilers of the Institutes have chosen for the *cupida legum juventus* of fourteen centuries ago, and to follow their methods. There is just a shade of neglect of the

theory involved in the legal institutions discussed. It is possibly too late in the day to make suggestions in a review of a book that is already in its third edition, but as there are sure to be many more editions, the following suggestions are nevertheless made for the consideration of the author. A general discussion seems desirable of the background and nature of Roman guardianship—did it, for example, give parental as well as proprietary control?—and of the capacity of the ward and its relationship to the functions of the tutor (these seem to be treated rather disparately in two parts of the book—see p. 86 and p. 343). After chiding Justinian for not treating of the nature of ownership in general, the author goes on to discuss Quiritary ownership and its contrasts, but does not himself describe the essential "absolute" nature of ownership and its action, the *vindicatio* (this action only receives slight mention in the chapter on theft (p. 375), and in connection with possession in modern systems (p. 178)). Again, why is there no fuller discussion of *causa civilis* in contract and of *injuria* and *culpa* in the *lex Aquilia*? Why no special discussion of the important and fascinating *actio doli*? Finally, the chapter on procedure is done with great lucidity and skill, but one would like to have the forms of actions not only in formulary times, but also under Justinian. In fact, there is just about one page on the extraordinary procedure altogether, and very little about its general characteristics. Professor Lee tells us that "the procedure in this period is not far removed from that with which we are familiar in modern times." That is music to the student's ears; so why not elaborate the proposition? What has happened in Justinian's system to *litis contestatio* and its effects, what to execution against the person, how do interdicts now operate, etc.?

A few minor points which seem to have escaped attention may also be mentioned. There appears to be a slight disharmony between par. 497.4, Inst. 3.25.5 and par. 495 on the question of an agreement to continue a partnership after the death of one partner. Was the *clausula arbitraria* allowed in all actions *in rem*, or only in the so-called *actiones arbitrariae*?—see par. 708 and *cf.* Inst. 4.6.31. Was the *exceptio* always an "equitable" defence?—Cf. par. 722 with par. 726.

B. Beinart.

Essays on the Australian Constitution. Edited by R. Else-Mitchell. [Australia: The Law Book Co. of Australasia Pty, Ltd. 1952. xxiv and 319 pp. 42s.]

Federalism. An Australian Jubilee Study. Edited by Geoffrey Sawer. [Melbourne: F. W. Cheshire Pty, Ltd. 1952. xii and 284 pp.]

The Jubilee of the Commonwealth of Australia in 1951 was celebrated by the legal profession in a manner befitting the occasion. To the Seventh Legal Convention of Australia were invited the heads of the Judiciary and other leaders of the profession from all the full members of the British Commonwealth. The occasion was also marked by the preparation of the two works now under review. It is a pleasure to commend them to the attention of English readers, for they make an important contribution to the study of the law and practice of the Australian Constitution.

The eleven *Essays on the Australian Constitution* are the work of an exceptionally strong team. Sir John Latham writes on the interpretation of the Constitution, Professor Beasley on the Commonwealth Parliament, Professor Sawer on the judicial power, Mr. Ross Anderson on the States and relations with the Commonwealth, Mr. Douglas Menzies on the defence power. Professor Baker on compulsory acquisition powers, Mr. R. M. Eggleston on industrial relations, Mr. P. D. Phillips on trade, commerce and

intercourse between the states, Mr. A. J. Hannan on finance and taxation, and Mr. J. G. Starke on the Commonwealth in international affairs. The essays are written by lawyers primarily for lawyers, and for lawyers who already know something of the Constitution and its interpretation. The beginner may find Mr. Ross Anderson's essay to be the most helpful. Although most of the writers have focussed attention upon the judicial interpretation of the Constitution, there is surprisingly little overlapping between the essays. They do not purport to cover the whole field, but one would have welcomed separate discussions of the executive power of the Commonwealth, and of the distinctively Australian conventions of the Constitution.

The symposium on *Federalism* is a work of unusual interest. It contains the proceedings of two seminars on Federalism organised by the Australian National University at Canberra, and attended by political scientists, economists, anthropologists, geographers and public servants, as well as by academic lawyers. Four of the papers deal with problems of federal finance, three with the broader political aspects of federalism and one with the record of judicial review in the Australian federal system. The contributors include Professor J. L. Montrose, of the Queen's University, Belfast, and Professor K. C. Wheare and Mr. Colin Clark, of the University of Oxford. Each paper is followed by a summary of the discussion that took place upon it. This method of presentation is superficially unattractive, but in fact the discussions greatly enhance the value of some of the papers, either by relating the author's general propositions to the Australian environment or by setting a case-study in its larger context. The book will be widely read as a record of one of the most searching examinations of federal institutions that has been published in recent years. The public lawyer will find much to stimulate him in Professor Sawer's robust and provocative attack on the myth of the non-political function of the judge in constitutional interpretation. No one who has read this book will remain sceptical of the possibilities of fruitful collaboration between academic lawyers and students in related disciplines.

S. A. de Smith.

Family Law. By Jack Hamawi, m.a., ll.b. (Cantab.) of the Inner Temple and Western Circuit. Barrister-at-Law. [London: Stevens & Sons, Ltd. 1953. pp. lxxvi and 364. £2 10s.]

The need has long been felt for an up-to-date book on Family Law; on the law, that is to say, of the family as a going concern rather than as a wreck to be divided up in the divorce court. This book, which Mr. Hamawi has written under the consulting editorship of Mr. W. A. Fearnley-Whittingstall, Q.C., and which includes a gracious foreword by Lord Justice Hodson, is a brave but not wholly successful attempt to meet this need.

The main reason for Mr. Hamawi's partial failure seems to be that he has attempted to do too much. His determination to cram everything remotely connected with his subject into 340 pages of text has resulted in a book so highly condensed and technical that it cannot be read with any comfort. The sacrifice of literary graces would matter little if the result was clear, but unfortunately the learned author has not succeeded in expressing himself intelligibly and simply, so that many of his sentences are almost incomprehensible. The book cannot, therefore, be recommended either to students [1] or to social welfare workers, although it appears from the preface that it was the author's intention to cater for their needs.

On the other hand, the wealth of authority which Mr. Hamawi has industriously collected should make the book useful to practitioners for

[1] Especially as the rubric at the top of p. 163 might have an adverse effect on their morals by leading them to suppose that it is obligatory to keep mistresses !

reference purposes. A good index and copious reference to articles in the periodicals enhances its value for this purpose. In any event, Mr. Hamawi has performed a useful service in blazing a trail which will greatly ease the task of those who follow him. When a really intelligible book on this important subject comes to be written, Mr. Hamawi will have the satisfaction of knowing that his efforts have helped to make it possible.

L. C. B. G.

International Economic Organisations. By C. H. Alexandrowicz, of Lincoln's Inn, Barrister-at-Law, Professor of International and Constitutional Law, University of Madras. [London: Stevens & Sons, Ltd. 1952. xii and 263 pp. 30s. net.]

International economic organisation has become a technical subject of great complexity and there has been a long-felt need for a work examining it, both from a legal and economic point of view. It is, therefore, a great pleasure to welcome Professor Alexandrowicz's book. The author opens with an admirable survey of the nineteenth-century system. This was essentially extra-organisational, private and lacking in any formal rules—it thus offered little scope for legal investigation of its nature and working. The Bank of England and other central banks looked after the world economic balance. Exchange rates fixed through the medium of gold were stable. With the outstanding exception of International Public Unions, such economic organisations as existed were due to private initiative.

This attractively informal and flexible system was irretrievably destroyed by the First World War and the Great Depression. The gold standard collapsed and London lost its pre-eminent position in the economic life of the world. Professor Alexandrowicz perhaps underestimates the activities of the League of Nations in the economic sphere. Whatever may be said of the Peace Conference, the League did not minimise the urgency of limiting national sovereignty in this field and for a time exercised an effective and salutary influence over States. The League, however, did neglect the institutional aspect of the matter and without an effective economic organisation it proved entirely unable to meet the Great Depression. During the Second World War the planners for peace were determined not to repeat the same mistake but, in their zeal, have pushed the pendulum to the other extreme. The author gives a lucid account of Lord Keynes's proposals for an International Clearing Union, the Bretton Woods agencies (the International Monetary Fund and the International Bank), the Havana Charter, the several European economic organisations and the Economic and Social Council. He is faced with the invidious task of surveying institutions, of which some have already proved inadequate to meet their appointed tasks (*e.g.*, the Fund) and others have altogether failed to be brought to life (*e.g.*, the International Trade Organisation). The picture he gives is, perhaps inevitably, somewhat distorted. Some readers may not appreciate that behind the grandiose façade of constitutional forms lies a much less impressive reality. The fact is that the Bretton Woods institutions were designed for a liberal world that has so far failed to materialise.

Professor Alexandrowicz has produced a most informative and valuable book. It should be of great assistance to the international lawyer and economist and a boon to the layman bewildered by the number and variety of international institutions which have become so characteristic a feature of our times.

J. K. Grodecki.

INTERNATIONAL LAW: CASES AND MATERIALS. By William W. Bishop, Jr., Professor of Law, University of Michigan. [New York: Prentice-Hall, Inc. 1953. xxvii and 735 pp.]

ALTHOUGH this book deals with international law, it is mainly designed for use in American law schools. It will, no doubt, serve admirably for this purpose. It contains an enormous amount of material, clearly arranged and carefully annotated. Modern institutional developments have not been neglected, but the bulk of the material presented consists of extracts from the decisions of American and international tribunals. Liberal use has also been made of English authorities, except, perhaps, on the subject of State immunities where no room has been found for more than brief mention of cases as important as *The Parlement Belge* or *The Cristina,* and none at all for the *Dollfus Mieg* case or for *Kahan* v. *Pakistan.*

The important topic of foreign confiscatory legislation is treated in connection with recognition. This treatment is justified by the fact that these issues have been frequently combined. But the discussion of *Bernstein* v. *Van Heyghen* should have afforded an opportunity to state that the problem of confiscation is not inevitably connected with that of recognition. Even recognised governments have been known to attempt extraterritorial confiscation. *Lorentzen* v. *Lydden* is cited in this context without any warning that this decision has not been followed in *Bank voor Handel* v. *Slatford.*

The English reader will find this casebook valuable as affording access to reports and materials not easily available here. He will also be interested in discovering the American point of view from which the book claims to be composed. It is, however, only fair to warn him that the author has usually not attempted to formulate the American attitude, nor expressed his own views, on controversial matters. Thus, the only comment made on the Nuremberg Trials is that "there has been an enormous amount of discussion." Similar reticence is observed in commenting, at some length, upon the Declaration of Human Rights. The American point of view is therefore only revealed in the selection and arrangement of the material, such as the full account given of the *Kasenkina* case in 1948.

J. UNGER.

THE DULAG LUFT TRIAL. Edited by E. CUDDON. War Crimes Trials Series, Vol. 9. [London: Hodge. 1952. xviii and 255 pp. 18s.]

THE *Dulag Luft Trial* concerned five Luftwaffe officers who were accused of "committing a war crime . . . in that they . . . in violation of the laws and usages of war, were together concerned as parties to the ill-treatment of British prisoners of war." The accused were the Commandant and four members of the staff of the principal Luftwaffe Interrogation Centre, and it was alleged that they were responsible for over-heating prisoners by means of electric radiators fitted in the cells; that they threatened to hand prisoners over to the Gestapo if they failed to answer questions—many refused to answer but none was apparently handed over and, in fact, evidence showed that the Commandant protected many from the Gestapo; that medical treatment was refused to those needing it for the same reason—again evidence by prisoners showed excellent and careful attention; prolonged solitary confinement; and, in some few cases, blows. The prosecution, however, only confined its case to over-heating, the denial of medical treatment and blows.

Of 40,000 prisoners who passed through the camp, no more than twelve could be cited as having undergone ill-treatment. The only evidence as to blows consisted of one prisoner having received a "shove," while another unidentified prisoner, who was not called to give evidence, was involved in a fight with his interrogator and guards—the interrogator involved was acquitted of all

charges. Unfortunately, there was no judge-advocate at this trial, one of the members of the court having been legally qualified. It is impossible, therefore, to ascertain the reasons for the judgment and why the Commandant, the head of the interrogation department, and the senior reception officer, were found guilty despite the fact that no prisoner ever protested to the Senior British Officer in the camp, that the incidents were isolated, and that the senior camp officers forbade over-heating immediately they heard of it. For all one can discover from the report, the accused were also found guilty of being parties to the beating, even though the officer actually responsible was acquitted.

The editor of the volume clearly doubted the justice of the verdict and his doubts will almost certainly be shared by the reader who notices the amount of prosecution evidence that was given by way of affidavit, the unfortunate way in which identification parades were conducted and the strange fashion in which the statements of the accused were originally taken. The defence were compelled to protest at the way in which the court and its members put questions to the accused — this questioning resembled a second cross-examination—while one is led to the feeling that, as alleged by defence counsel (all British officers), the bulk of the case for the prosecution consisted of "mere figments of the over-fertile imagination of the learned Prosecutor." This feeling of disquietude might well have been removed had a judge-advocate been present to sum up. Although such an officer is not required at courts-martial if a member of the court is legally qualified, it would be more in keeping with the principle that justice should be seen to be done if a proper summing up took place, and if it did not appear that the prosecutor was also the legal adviser to the court.

In his foreword to the volume, Sir Frank Soskice said: "The trials were not for the purpose of revenge. In long-term history they must be viewed as a symptom of the determination of world conscience that heinous acts practised on an international scale cannot be allowed to go unchecked and unpunished. They are the spreading by common consent into the international plane of the domestic judicial institutions of individual countries which they found necessary for the purpose of ordering their own domestic life." It is a pity that these thoughts preface such an unfortunate example.

L. C. Green.

Notable British Trials Series. Vol. 77 : The Trial of Peter Barnes and Others (The I.R.A. Coventry Explosion of 1939). Edited by Letitia Fairfield, c.b.e., m.d., Barrister-at-Law. [London: William Hodge. 1953. xiv and 284 pp. 15s.]
Vol.: 78: The Trial of John George Haigh (The Acid Bath Murder). Edited by Lord Dunboyne, Barrister-at-Law. [London: William Hodge. 1953. 271 pp. 15s.]

The Coventry explosion a few days before the outbreak of war in 1939 was the worst of the series of outrages committed by the so-called Irish Republican Army in its "campaign" for the abolition of the border — a campaign which, it will be remembered, was in no way backed by the Government of Eire. The two men convicted of murder at the Birmingham Assizes after the trial, which is now fully reported in the Notable Trials Series, were the only ones among the 500 to 1,000 misguided Irish nationalists operating in England who were sentenced to death, although by the time the tragic incidents came to an end early in 1940, no fewer than twenty-three men and women had been sentenced to penal servitude for twenty years, thirty-four for periods of ten to twenty years and another thirty-seven for lesser terms.

Though it came at a moment of considerable national stress, when the

potential danger of the bomb outrages had to be seen in full relation to the country's need for self-defence in war, the case was conducted by the police and counsel for the prosecution with the most scrupulous fairness and great skill. Of the three men and two women who were jointly indicted and tried, two only were found guilty. A difficult problem of the law of evidence was presented by the statements and testimony in court of the two women, who were eventually acquitted, and it was strenuously argued before the Court of Criminal Appeal that there ought to have been a direction by the judge that this evidence (which gravely incriminated the other prisoners) required corroboration. The report of the judgment on appeal (27 Cr.App.R. 154; 56 T.L.R. 379; [1940] 2 All E.R. 229), which is here reprinted does not make it quite clear on what ground this argument was rejected, but this case is now, perhaps somewhat unsatisfactorily, quoted in leading textbooks for the new and wide proposition that the rule requiring corroboration does not apply to "co-defendants whose evidence is not relied on by the prosecution, but who give evidence on their own behalf and incidentally implicate the accused."

In her introduction, the editor has attempted to set the account of the trial against the background of the struggle for Irish independence. The usefulness of her outline from the historical point of view is considerably raised by a number of documentary appendices which, *inter alia,* give details of sabotage trials against Irish nationalists in the nineteenth century, a full nominal list of all those sentenced as a result of the 1939/40 outrages and a long captured set of instructions, the S-Plan, which is most revealing for the overall planning of these terrorist activities.

At the time of the *Haigh* trial, which is reported in another new volume in this series, it was rumoured that the accused had assigned to a newspaper the copyright of anything he was to write for the press, and that he was thereby enabled to pay for his defence. The propriety of such an arrangement (if made at all) was not challenged here, but it is quite possible that this trial will eventually be best remembered for this side issue or for that which involved the editor and proprietors of another national newspaper in serious contempt proceedings.

The case against Haigh was relatively free from complexity—in fact not one word of the testimony for the prosecution was challenged and the defence cross-examined only four of the thirty-three witnesses. The defence rested on insanity alone, a thesis which was valiantly but unavailingly supported by the only doctor who appeared at the trial, the prosecution having decided to call no medical evidence at all. In a searching appendix on the medical aspects of the case, Dr. Clifford Allen arrives at the diagnosis that Haigh "suffered from a psychopathic personality . . ." and was "an abnormal type, being neither entirely sane nor entirely insane." Four experienced prison doctors, on the other hand, who examined the prisoner between his arrest and trial, seem to have been satisfied that he was responsible for his actions and merely malingering insanity. To make assurance doubly sure, the Home Secretary caused a special medical inquiry to be made before the execution of the death sentence, which resulted in the agreement of all the three psychiatrists appointed that "Haigh was simulating insanity and that there was not the slightest reason to believe that he was irresponsible according to legal standards, or insane according to medical standards." That indeed ought to satisfy anyone, but why such a thorough medical inquiry, if necessary or valuable at all, should take place after the trial, when there is no longer any possibility of testing the report judicially, instead of before, is a question which remains wide open.

H. A. Hammelmann.